17

CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 234.

THE UNITED STATES UPON THE RELATION AND FOR THE USE AND BENEFIT OF TEXAS PORTLAND CEMENT COMPANY ET AL.

vs.

D. C. McCORD AND NATIONAL SURETY COMPANY OF NEW YORK.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FILED APRIL 20, 1912.

(23,168)

(23,168)

SUPREME COURT OF THE UNITED STATES.

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THE UNITED STATES UPON THE RELATION AND FOR THE USE AND BENEFIT OF TEXAS PORTLAND CEMENT COMPANY ET AL.

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D. C. McCORD AND NATIONAL SURETY COMPANY OF NEW YORK.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 9, 1913.

1 United States Circuit Court of Appeals, Fifth Circuit.

No. 2252.

THE UNITED STATES upon the Relation and for the Use and Benefit of Texas Portland Cement Company et al., Plaintiffs in Error,

v.

D. C. McCORD and NATIONAL SURETY COMPANY OF NEW YORK, Defendants in Error.

Error to the Circuit Court of the United States for the Northern District of Texas.

Be it remembered, That this cause came on to be heard on a transcript showing the following facts:

This action was instituted in the Circuit Court for the Northern District of Texas on January 3, 1910, by the United States, upon the relation and for the use and benefit of Texas Portland Cement Company and others, against D. C. McCord and the National Surety Company of New York, to recover from said D. C. McCord, as principal, and said Surety Company, as surety, certain sums of money, aggregating approximately $30,000.00, for certain materials furnished and labor performed by the plaintiffs in the erection of certain public works, to-wit: Locks and dams on the Trinity River, in the Northern District of Texas. The action was against the principal and surety on a bond given conformably to the Act of August 13, 1894, Chap. 280, 28 Stat. at L. 278, as amended February 24, 1905, Chap. 778, 33 Stat. at L. 811, for the performance of a contract by the said McCord for the construction of lock and dam No. 1 and dam at Parson's Slough, in section 1 of the Trinity River, according to certain plans and specifications attached to the contract, all of which were duly set forth.

2 The contract specified, among other things, that the contractor, D. C. McCord, should be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material. To secure the performance of the contract, said McCord, as principal, and the National Surety Company of New York, as surety, on March 19, 1906, executed and delivered their certain bond in the penal sum of $34,000.00, payable as required by law, and conditioned, among other things, that the said McCord should make full payments to all persons supplying him labor or materials in the prosecution of the work provided for in said contract. The petition of the plaintiffs attached the said contract and the said bond as exhibits, and duly declared thereupon and specifically alleged breaches of the said contract and bond and specifically alleged that the several plaintiffs had furnished materials and had performed labor for the said contractor which was used, and which was necessary to be used, by the contractor, McCord, in the performance of

his aforesaid contract with the United States. The contract was performed and completed by McCord on the 12th day of October, 1909, and, on the 11th day of November, 1909, a final settlement of said contract was had between the United States of America and the contractor, D. C. McCord. The original petition was filed after the completion of the contract and the final settlement of the contractor with the United States, and it contained this allegation:

"Said contract was by the said defendant, McCord, completely per*fro*med on the — day of September, A. D. 1909, and thereafter, on to-wit: the — day of November, A. D. 1909, a full, final, and complete settlement of said contract was had by and between the said defendant, McCord, and said United States of America, and said United States of America, being and having been fully satisfied in the premises, has on its own behalf no claim whatever against the said defendants, or either of them, nor have the United States of America, on their own behalf, any cause of action whatever
3 against said defendants, or either of them, on account of said contract and said bond, or either of them; and therefore said United States of America will not, within six months from the completion and final settlement of said contract, nor will it within any other time, bring any action for its own use or on its own behalf against the said defendants, or either of them."

This allegation was sustained by proof, in that "it was stated in open court to the Court by the counsel and agreed upon that the contract sued on in the plaintiffs' petition was performed and completed on the 12th day of October, 1909, and that thereafter on the 11th day of November, 1909, a final settlement of said contract was had between the United States of America and the contractor, D. C. McCord, and that the United States of America, after said settlement, neither had nor asserted any claims, demands, or cause of action against either the said D. C. McCord, the contractor, defendant herein, or against the defendant, National Surety Company of New York, by reason of said contract and bond mentioned in Plaintiffs' petition."

An appropriate order for service by publication and notice was had. On May 3d, 1910, the National Surety Company filed what it termed its plea in abatement, upon the ground that the suit was brought in the name of the United States without authority of law, and that the plaintiffs had no cause of action, because six months had not intervened between the completion and final settlement of the contract and the filing of the suit.

Numerous other parties who supplied material to the contractor, or who performed labor for him, in the construction of the work, intervened in the cause. It is material to consider but one of such interventions, to-wit: that of W. Illingsworth. This intervention was filed on May 25th, 1910. It was filed more than six months after the final completion of the work and the final settlement of the contractor with the United States, and it was filed within twelve months from such completion and settlement. The intervention of Illingsworth constitutes a complete bill, and has attached to it, as

exhibits, the contract and the bond, with appropriate allega-
4 tions of the breach thereof and the consequent liability of the principal and surety. This intervention begins as follows:

"Comes now the United States of America, suing for the use and benefit of Texas Portland Cement Company, Jones Lumber Company, The Kansas City Wire and Iron Works Company, Mosher Manufacturing Company, Jacksboro Stone Company, and W. S. Kirby, and others intervening in the above styled and numbered cause, among whom is W. Illingsworth, intervener for and in his own behalf, complaining of D. C. McCord and the National Surety Company of New York, W. Illingsworth, intervener, represents in his own behalf as follows:

"He says that the original cause of action was filed by the parties relators above named and is by your petitioner, W. Illingsworth, intervener prosecuted in accordance with and by virtue of the Act of Congress in (such) cases made and provided, to-wit: the Act of Congress of date May 24, 1905, chapter 778, 33 Statutes at Large, 811, entitled an Act to Amend an Act Approved August 13, 1894, Entitled, An Act for the Protection of Persons Furnishing Materials and Labor for Construction of Public Works.

Said bill of intervention concludes with the following prayer:

"He further prays that if the recovery on the bond herein sued on should be inadequate to pay the amounts found due to all creditors recovering judgment in this cause on said bond, that each creditor have judgment pro rata of the amount of the recovery against the bond and surety, as provided by law."

Subsequently, on January 9th, 1911, the original plaintiffs filed an amended original petition, merely elaborating the allegations of their original petition and specifically averring as follows, to-wit:

"Said contract was by the said defendant, McCord, finally performed and completed on the 12th day of October, A. D. 1909, and thereafter, on to-wit: the 11th day of November, A. D. 1909 a full, complete, and final settlement of said contract and of all matters of whatsoever character arising out of the same was had by and
5 between the said defendant, McCord, and said United States of America, and said United States of America was then and there, and ever since said date has been, fully satisfied in the premises, and said United States of America had not, after the said 11th day of November, 1909, on its own behalf, any claim of whatsoever character against the said defendants, or either of them, on account of said contract, nor have the United States of America, on their own behalf, any cause of action whatever against said defendant, or either of them, on account of said contract and said bond, or either of them, and therefore said United States of America did not, within six months from the completion and final settlement of said contract, nor within any other time, bring any action for its own use or on its own behalf against the said defendants, or either of them, and the said United States of America, having on its own account no claim whatsoever on account of said contract or on account of any matters whatsoever arising out of the same, had not the legal right to institute or maintain any suit upon the bond declared upon herein,

except as such suit might be instituted and maintained upon the relation of some one entitled to recover upon said bond by reason of having performed labor upon the aforesaid work or by reason of having furnished material therefor."

On February 2d, 1911, the intervener W. Illingsworth dismissed his intervention, and thereafter the Court ordered that his petition and petition in intervention be dismissed with costs.

On February 22d, 1911, the plea or demurrer of the National Surety Company was heard and tried upon an agreement to the effect that the contract referred to in plaintiffs' petition was performed and completed on the 12th day of October, 1909, and that thereafter, on to-wit: the 11th day of November, A. D. 1909, a final settlement of said contract was had between the United States and the contractor, D. C. McCord, and it was further agreed that the United States thereafter neither had nor asserted any claims, demands, or causes of action against either the said contractor or the National Surety Company by reason of said contract and bond mentioned in the
6 plaintiffs' petition, and upon consideration thereof by the Court it was ordered, adjudged, and decreed that the said plea be sustained, and the cause was dismissed as to the National Surety Company, with its costs. Thereafter, on May 26th, 1911, the cause was dismissed as to the defendant, McCord, upon the ground that the suit was instituted prior to the expiration of six months from the completion of the work and the final settlement with the government, and that, therefore, the action was not maintainable upon the bond sued upon. To the action of the Court in dismissing the cause as to the National Surety Company, the plaintiffs duly and seasonably excepted. To the action of the Court in dismissing the cause as to the defendant, McCord, the plaintiffs duly and seasonably excepted, upon the grounds:

1. That this suit was not prematurely instituted;

2. That if this suit was instituted prematurely, such fact would not operate a dismissal of it but would only operate to impose the costs upon the plaintiffs;

3. Because an appropriate suit and intervention was duly filed herein by W. Illingsworth for himself and all other creditors, after the expiration of six months from the completion of the work and the final settlement with the United States in relation thereto, and prior to the expiration of twelve months therefrom, and such intervention was in all respects sufficient as a suit in this cause, and if the plaintiffs' suit was premature their petition in any event should have been considered as an intervening petition seasonably filed.

A writ of error seasonably sued out has brought the case to this court for review of the judgment dismissing the action as to the Surety Company and also the judgment dismissing the action as to McCord.

A motion to dismiss is made upon the ground that the judgments below were rendered on pleas in abatement not involving jurisdiction, and, besides, were not final.

And the said cause having been argued and submitted, and the

Court for the proper decision of the same desiring the instruc-
7 tion of the Supreme Court of the United States, does hereby certify to the Supreme Court the following questions, to-wit:

First. Under the provisions of the Act of August 13, 1894, (28 Stat. 278) as amended by the Act of February 24, 1905, (33 Stat. 811) may persons, who furnish material and perform labor in the construction of governmental works, bring suit, on the bond of the contractor in the Federal Court in the name of the United States for their use and benefit, within six months from the completion of the works and final settlement of the contract, where it appears of record and was agreed by the parties in open court, that after performance and settlement of the contract, the United States neither had nor asserted any claims, demands or cause of action either against the contractor or the sureties on his bond?

Second. If the original bill was prematurely filed, was a right of action saved to the parties, so filing the same, by the intervention of Illingsworth, which was filed after the six months but before the expiration of the twelve months' period, and the amended bill, filed more than one year after the completion and settlement of the contract between the Government and the contractor?

And that the Supreme Court may be, if necessary, more fully advised of the facts in the case, a printed copy of the transcript and briefs will be transmitted with this certificate.

The foregoing is ordered filed by the Clerk.

In witness whereof, the undersigned Judges affix their signatures, this the 10th day of April, 1912.

DON A. PARDEE,
Circuit Judge.
DAVID D. SHELBY,
U. S. Circuit Judge.
T. S. MAXEY,
District Judge.

(Original filed April 11th, 1912.)

8 UNITED STATES OF AMERICA,
Fifth Judicial Circuit, ss:

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing certificate and statement of facts in the case of the United States ex rel. Texas Portland Cement Co., et al., plaintiffs in error, versus D. C. McCord, et al., defendants in error, was duly filed and entered of record in my office by order of said court, and, as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In Testimony Whereof, I have hereunto subscribed my name,

and affixed the seal of said court, at the City of New Orleans, Louisiana, this 11th day of April, A. D. 1912.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK HASTINGS MORTIMER,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

[Endorsed:] No. 2252. United States Circuit Court of Appeals for the Fifth Circuit. United States ex rel, Texas Portland Cement Co. et al. vs. D. C. McCord, et al. (Certificate and statement of facts.)

Endorsed on cover: File No. 23,168. U. S. Circuit Court Appeals, 5th Circuit. Term No. 234. The United States upon the relation and for the use and benefit of Texas Portland Cement Company et al. vs. D. C. McCord and National Surety Company of New York. (Certificate.) Filed April 20th, 1912. File No. 23,168.

No. 617
October Term, 1912.

THE UNITED STATES OF AMERICA, UPON THE RELATION AND FOR THE USE AND BENEFIT OF TEXAS PORTLAND CEMENT COMPANY, et al.,
Plaintiffs in Error,

vs.

D. C. McCORD, AND NATIONAL SURETY COMPANY OF NEW YORK,
Defendants in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

To the Honorable Supreme Court of the United States:

Your petitioner, National Surety Company of New York, respectfully represents, that it is one of the defendants in error in the above entitled and numbered cause, and that said cause is now pending in the United States Circuit Court of Appeals, Fifth Circuit, wherein certain questions have been certified by said court, to this Honorable Court.

Your petitioner further represents that it desires to avail itself of the right accorded by Section 2 of Rule 37, of this Honorable Court, to make application that the whole record and cause may be sent up to this court for its consideration, and it here and now makes such application.

Your petitioner, as required by said rule, presents herewith a certified copy of the whole of said record.

Wherefore, your petitioner respectfully prays that the whole record and cause may be sent to this court from the

United States Circuit Court of Appeals for the Fifth Circuit, to this Honorable Court for its consideration.

CHARLES W. STARLING,
W. F. ROBERTSON,
CARDEN, STARLING, CARDEN & HEMPHILL,
Attorneys for Petitioner.

The plaintiffs in error in the above entitled cause, acknowledge service of the foregoing motion and have no objections to the same being granted.

FRANCIS MARION ETHERIDGE,
JOSEPH MANSON McCORMICK,
Attorneys for Plaintiffs in Error.

W. Illingworth, one of the defendants in error, in the above entitled cause, here and now alcknowledges service of the foregoing motion and states that he has no objections to the same being granted.

(*Signed*) W. ILLINGWORTH.

W. ILLINGWORTH.

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IN THE

Supreme Court of the United States.

[redacted]

THE UNITED STATES OF AMERICA, UPON THE RELATION AND FOR THE USE AND BENEFIT OF TEXAS PORTLAND CEMENT CO., et al.,

Plaintiffs in Error,

vs.

D. C. McCORD, AND NATIONAL SURETY COMPANY OF NEW YORK,

Defendants in Error.

PENDING ON CERTIFIED QUESTIONS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF NATIONAL SURETY COMPANY, *ASSIGNING REASONS WHY MOTION SHOULD BE GRANTED ASKING THAT THE ENTIRE RECORD BE BROUGHT UP.*

CHARLES W. STARLING,
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Attorneys for Petitioner, National Surety Co. of New York.

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IN THE

Supreme Court of the United States.

No. 617, October Term, 1912.

THE UNITED STATES OF AMERICA, UPON THE RELATION AND FOR THE USE AND BENEFIT OF TEXAS PORTLAND CEMENT CO., et al.,

Plaintiffs in Error,

vs.

D. C. McCORD, AND NATIONAL SURETY COMPANY OF NEW YORK,

Defendants in Error.

PENDING ON CERTIFIED QUESTIONS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF NATIONAL SURETY COMPANY,

ASSIGNING REASONS WHY MOTION SHOULD BE GRANTED ASKING THAT THE ENTIRE RECORD BE BROUGHT UP.

To the Honorable Supreme Court:

This cause is pending in this court on two certified questions from the Circuit Court of Appeals, Fifth Circuit, growing out of a judgment of the Circuit Court, sustaining a plea in abatement and dismissing the action because prematurely brought. These questions are found on pages 272 273 of the certified copy of the record presented to this Honorable Court with a motion that the entire record and

cause be sent up, such motion having been filed by the National Surety Company, one of the defendants in error. The transcript prepared by the Circuit Court of Appeals, upon which the questions are based, hereinafter called the transcript, shows that the action was against the principal and surety on a bond given conformably to the Act of August 13, 1894, Chap. 280, 28 Stat. a L. 278, as amended February 24, 1905, Chap. 778, 33 Stat. a L. 811. There was no appearance by McCord in the Circuit Court of Appeals, and there has been none by him in this court. All the other parties to the action have consented that the motion referred to, filed by the National Surety Company, be granted by this Court, McCord has been duly served with notice thereof, and The National Surety Company presents the following reasons why this Court should grant such motion and thereby assume a jurisdiction in which all parties appearing are willing should be conferred, and to which none have objected.

I.

Inasmuch as this Court has final jurisdiction of this cause, should it develop that the transcript prepared by the Circuit Court of Appeals upon which the certified questions are based, is in any material way incomplete, or contains erroneous conclusions, or that the questions themselves are insufficient to present all issues involved, then the Circuit (now District) Court might possibly be instructed to set aside its former order and proceed with the case, and the very same questions that are now contained in the record, but not certified or shown by the transcript, would again come before this Court for final review.

II.

The transcript makes only the following reference to the character and contents of the plea in abatement interposed by the National Surety Company, upon consideration of which the judgment of dismissal was entered:

"On May 3d, 1910, the National Surety Company filed what it termed its plea in abatement, upon the ground that the suit was brought in the name of the United States without authority of law; and that the plaintiffs had no cause of action because six months had not intervened between the completion and final settlement of the contract and the filing of the suit."

Attention is invited to the fact that the original plea in abatement (Record 161), and the amended plea in abatement (Record 163), set out the facts showing that the suit was prematurely brought, and specifically charge:

"That this suit is brought in the name of the United States of America without authority of law, and that no cause of action has accrued or exists in favor of any of the parties upon whose relation or for whose use and benefit this suit has been brought."

The transcript further states that on February 22, 1911, the plea of demurrer of the National Surety Company was heard and tried upon an agreement. There is nothing in the record to indicate that this plea is, or was considered as a demurrer. It was called a plea and set up facts outside plaintiff's amended petition and, on hearing, an agreement was made, touching such facts, and the Court and counsel treated it as a plea in abatement. There is nothing in the record indicating that it was treated in any other way.

III.

The transcript shows that on January 9th, 1911, the original plaintiffs filed an amended original petition, merely elaborating the allegations of their oiriginal petition. This first amended original petition is found on pages 183 to 203 inclusive, of the record. Attention is invited to the following facts, showing that this is an amended petition in so far, and only in so far as it affects one, and only one of the relators, to-wit: The Texas Portland Cement Company,

and that it was not an amended original petition in the sense that it is a substitute for, and in lieu of, the original petition brought for the use and benefit of the creditors named in the commencement of said original petition found on page 2 of the record. This amended original petition contains this caption: "First Amended Original Petition, upon the relation of Texas Portland Cement Company" (Record 183); also (Record 203). This amended original petition is commenced as follows (Record 183):

"The United States of America, upon the relation of and for the use and benefit of Texas Portland Cement Company, leave of the Court being had so to do, file this, their first amended original petition herein, amending and in lieu of their original petition herein filed on January 3, 1910, *in so far as the same relates to the cause of action of said Texas Portland Cement Company.*"

The original petition (Record 4) makes the following averments touching the Texas Portland Cement Company:

"That it on divers and sundry dates between January 21st, 1907, and December 1st, 1908, furnished the defendant, McCord, with divers and sundry shipments of cement * * * as specified in its itemized account hereto attached marked Exhibit C, and which is made a part hereof, same being of the value of Sixteen Thousand One Hundred Thirty and 32-100 Dollars ($16,130.32), which was the reasonable market value thereof upon the respective dates of said delivery thereof; which from time to time the said defendant, McCord, has made payments as specified in said account, aggregating the said sum of $5,451.02, leaving a balance of Ten Thousand Six Hundred Seventy-Nine and 80-100 Dollars ($10,679.80) due and unpaid."

The amended petition (Record 186) in substance avers that The Iola Portland Cement Company (not the Texas Portland Cement Co.) between January 21, 1907, and August 19, 1907, sold and delivered to McCord, cement of

the value of Twelve Thousand Eight Hundred Eighty-One and 66-100 Dollars ($12,881.66) upon which the sum of Four Thousand Four Hundred Fifty-One and 2-100 Dollars ($4,451.02) had been paid, leaving the amount of the indebtedness to the said The Iola Portland Cement Company the sum of Eight Thousand Four Hundred Seventeen and 64-100 Dollars ($8,417.64).

The amended petition further charges (paragraph 6, page 187):

"That after October 28, 1907, and prior to July 16, 1908, the said The Iola Portland Cement Company ceased to do business, and was succeeded by the plaintiff, Texas Portland Cement Company, That said Texas Portland Cement Company, for a valuable consideration, assumed the liabilities and acquired all and singular the interests of the said The Iola Portland Cement Company and the said plaintiff, the Texas Portland Cement Company is now the legal owner and holder of the aforesaid account of the Iola Portland Cement Company against defendant, D. C. McCord, and as such owner, said plaintiff, Texas Portland Cement Company is entitled to recover thereupon in this action and to enforce the same."

Said amended petition further avers in substance (Record 188-189) that the plaintiff, Texas Portland Cement Company, sold to McCord cement of the value of Three Thousand Two Hundred Sixty-Two and 16-100 Dollars ($3,262.16), upon which One Thousand Dollars ($1,000.00) has been paid. "Leaving a balance due on said account by said defendant, D. C. McCord, to the said Texas Portland Cement Company of Two Thousand Two Hundred Sixty-two and 16-100 Dollars ($2,262.16), together with interest thereon from January 1st, 1909, at the rate of six (6) per cent per annum, and plaintiffs therefore aver that said defendant, D. C. McCord is not justly indebted to the said Texas Portland Cement Company in the full sum of Ten Thousand

Six Hundred Seventy-Nine and 80-100 Dollars $(10,679.80), together with interest."

It will be observed that nothing is said in the plaintiff's original petition about any part of the claim of the Texas Portland Cement Company of Ten Thousand Six Hundred Seventy-Nine and 80-100 Dollars ($10,679.80) arising by virtue of any material furnished by The Iola Portland Cement Company or about the ownership of such claim having been originally in said The Iola Portland Cement Company and having been assigned to the Texas Portland Cement Company. It will also be observed that in the amended petition the Texas Portland Cement Company abandons its claim for this amount, which it originally asserted arose by reason of its furnishing material. The National Surety Company contends that this amendment is something more than an elaboration of the allegations contained in the original petition, and that by reason of the change of the basis of the action the original relators can not be heard to say that they acquired any rights thereunder.

The transcript further shows that the action was brought for the use and benefit of the Texas Portland Cement Company and others. It does not give the names of such others. The record shows (page 2) that there were seven others and they are named. The amendment filed on January 10th, 1911, names simply the Texas Portland Cement Company (Record p. 183).

IV.

The transcript shows that a motion to dismiss was made in the Circuit Court of Appeals upon the ground that the judgments below were rendered on pleas in abatement not involving jurisdiction, and besides were not final. The Circuit Court does not certify to this court whether, under Section 1011 of the Revised Statutes, it should or not reverse the judgment of the court below, it being upon such plea in abatement. Neither does it certify whether it should sus-

tain such motion to dismiss. The motions themselves are found on pages 257 to 265 of the record now before this Court.

V.

The transcript shows that on February 22nd, 1911, the plea was sustained and the cause was dismissed as to the National Surety Company; and that thereafter, on May 26th, 1911, the cause was dismissed as to McCord. It further shows that to the action of the court in dismissing the cause as to the National Surety Company, the plaintiffs duly and seasonably excepted; and that to the action of the court in dismissing the case as to the defendant, McCord, the defendants duly and seasonably excepted, upon certain grounds, setting out the grounds (Record pp. 271-2). The transcript fails to show that the exception taken to the order dismissing as to the National Surety Company was in general terms only; and that the exception taken to the action of the court in dismissing the cause as to the defendant, McCord, wherein specific grounds are set up, was at a term of court subsequent to the entering of the order dismissing as to the National Surety Company. The order sustaining the plea in abatement was made February 22nd, 1911 (Record 205), and contains this exception (Record 206): "The plaintiffs in open court duly excepted, which exception is hereby duly allowed and approved." Subsequently during term time, to-wit: on March 24th, 1911, a more extended bill of exceptions was prepared and approved and filed (Record 210-12). This later bill of exceptions contains the following:

"And upon said statements of fact not appearing in the record, and upon the record in this cause, the said plea of the defendant, National Surety Company of New York, was submitted, and thereupon the court sustained said plea in abatement and entered an order that said cause be abated and dismissed as to the defendant, National Surety Company of New York, * * * to which action of the court in sus-

taining said plea in abatement and in abating said suit as to said defendant, National Surety Company of New York, and dismissing said National Surety Company of New York, from said suit, and awarding costs in behalf of said National Surety Company of New York in said suit, the United States of America upon the relation of said Texas Portland Cement Company (and the other relators, naming them) tender and present the foregoing as their bill of exceptions in this cause to the action of the court and pray that the same may be filed and allowed and signed."

At the subsequent term of the court, to-wit: On May 26th, 1911, the action was dismissed as to McCord (Record 215). On the day thereafter a bill of exceptions was allowed upon the action of the court in dismissing said suit as to McCord, which bill for the first time made reference to the intervention filed by Illingworth (See paragraph No. 3, Record 217). This is material in that the plaintiffs in error seek in the Circuit Court of Appeals to reverse the action of the Circuit (District) Court because of the filing of the Illingworth amendment, and the Circuit Court of Appeals has certified to this Court the questions thus presented, without showing that such questions were in no manner presented to the trial court.

VI.

The transcript shows that the intervention of W. Illingworth (mentioned in the second certified question) constitutes a complete bill, but only brief portions thereof are set out in such transcript. There is omitted from the transcript the following part, found on page 148 of the record:

"W. Illingworth having obtained permission to intervene in said cause, which he has a right to do under said act, for cause of action in his own behalf represents to the Court as follows:"

The petition is not signed by, and on behalf of the Un-

ited States of America suing for the use and benefit of anyone, but is signed: "W. C. Kimbrough, attorney for intervenor, W. Illingworth."

VII.

The transcript shows that an appropriate order for service by publication and notice was had. The record shows that no such order for service by publication and notice was had except that on January 10, 1910, one week after the original petition was filed (Record pp. 61-62). It shows that there was no order of service by publication and notice, making reference to the filing of the Illingworth petition either before or after such petition was filed. The record also fails to show that any service of any character upon the Illingworth petition was had.

VIII.

The National Surety Company considers all of these differences between the transcript and the record, and the questions not certified, material to its rights. It presented to the Circuit Court of Appeals all questions arising out of the record, but not certified or shown in the transcript, and desires to present such questions to this court, and if this motion is granted, will do so at this time. On the other hand, if this motion is not granted, and the case should be remanded to the trial court, after the certain questions have been answered, it will preserve its rights when the District Court acts, and will again, if necessary, undertake to present them to this court for final determination.

It is respectfully submitted that it will expedite the business of this court and of the District Court, and the Circuit Court of Appeals; and that it will be in furtherance

of justice if the entire record and case is now brought into this Court for its consideration and judgment.

Respectfully submitted,

CHARLES W. STARLING,
W. F. ROBERTSON,
CARDEN, STARLING, CARDEN & HEMPHILL,
Attorneys for Petitioner, National Surety Co. of New York.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 234.

THE UNITED STATES upon the Relation and for the Use and Benefit of TEXAS PORTLAND CEMENT COMPANY ET AL.

vs.

D. C. McCORD and NATIONAL SURETY COMPANY OF NEW YORK.

BRIEF FOR RELATORS.

FRANCIS MARION ETHERIDGE,
JOSEPH MANSON McCORMICK,
Attorneys for the United States of America upon the Relation of and for the Use and Benefit of Texas Portland Cement Company, Jones Lumber Company, Kansas City Wire & Iron Works Company, Mosher Manufacturing Company, Jacksboro Stone Company, Fulton Bag & Cotton Mills, Clem Oil Company, and W. S. Kirby.

INDEX.

LIST OF CASES CITED.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 234.

THE UNITED STATES UPON THE RELATION AND FOR THE USE AND BENEFIT OF TEXAS PORTLAND CEMENT COMPANY ET AL.

vs.

D. C. McCORD AND NATIONAL SURETY COMPANY OF NEW YORK.

BRIEF FOR RELATORS.

Statement.

This case is here on two certified questions from the Court of Appeals for the Fifth Circuit.

The first question certified is—

> "Under the provisions of the act of August 13, 1894 (28 Stat., 278), as amended by the act of February 24, 1905 (33 Stat., 811), may persons, who furnish material and perform labor in the construction of governmental works, bring suit, on the bond of the contractor in the Federal court in the name of the United

States for their use and benefit, within six months from the completion of the works and final settlement of the contract, where it appears of record and was agreed by the parties in open court, that after performance and settlement of the contract, the United States neither had nor asserted any claims, demands or cause of action either against the contractor or the sureties on his bond?''

Proposition.

Relators had the right to institute their suit on January 3, 1910, because they pleaded and proved that the contract was completely performed on October 12, 1909, and that a final settlement thereof was made on November 11, 1909, and that in such settlement the United States were fully satisfied and neither had nor asserted any claim against the contractor or his surety, and therefore that they neither would nor could institute or maintain on their behalf, either within or without the six months' period, any action whatsoever.

Statement.

It was alleged and proved "that the contract sued on in the relators' petition was performed and completed on the 12th day of October, 1909, and that thereafter, on the 11th day of November, 1909, a final settlement of said contract was had between the United States of America and the contractor, D. C. McCord, and that the United States of America after said settlement neither had nor asserted any claim, demand or cause of action against either the said D. C. McCord, the contractor, defendant herein, or the defendant National Surety Company of New York, by reason of said contract and bond mentioned in the plaintiff's petition" (Certificate, page 2).

Authorities.

Title Guaranty & Trust Co. *vs.* Crane Co., 219 U. S., 24.
United States *vs.* Ansonia Brass & Copper Co., 218 U. S., 452, 471.
Hill *vs.* American Surety Co., 200 U. S., 197.
Guaranty Co. *vs.* Pressed Brick Co., 191 U. S., 416.
American Surety Co. *vs.* Lawrenceville Cement Co., 110 Fed. Rep., 717.
United States *vs.* National Surety Co., 92 Fed. Rep., 549.
United States *vs.* Rundle, 100 Fed. Rep., 400.
United States *vs.* Henderlong, 102 Fed. Rep., 2.
Howard *vs.* United States, 184 U. S., 676.

ARGUMENT.

The question as thus presented is *res nova* and must be determined by a consideration of the objects and purposes of the statute rather than of its literal phraseology. It is conceded that the statute does not expressly prohibit the institution and maintenance of a suit by an individual creditor within six months after the completion of a contract and the final settlement thereof; but it is contended that such a prohibition results by necessary implication from the phraseology of the statute, and this although the pleading and proof show that the Government is wholly without interest. The pertinent portion of the statute upon which such contention is based is this:

> "If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the * * * persons supplying the contractor with labor and materials * * * are hereby authorized to bring suit in the name of the United States * * * for * * *

> their use and benefit against the said contractor and his sureties; * * * *provided*, that where suit is instituted by any such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof."

The trial court conceived the case to be ruled by the decision in Stitzer *vs.* United States, 182 Fed. Rep., 513, and followed the same with evident reluctance, saying:

> "It seems and is a harsh application of this law, as construed by the Circuit Court of Appeals, to sustain this plea in abatement. As here applied, it seems to penalize vigilance and diligence and to forfeit plaintiffs' valuable remedial rights broadly given through the mistaken construction of its terms by able and painstaking counsel. The proper construction of these terms is not, to my mind, 'so natural and obvious' as to render their import and meaning clear and certain. Nevertheless, from every point of view I deem it proper and appropriate for this court to follow the ruling announced in Stitzer *vs.* The United States, and therefore an order will be entered sustaining the defendant, Surety Company's, plea in abatement" (Rec., 209).

The Court of Appeals, as is manifest from the certificate doubted either the applicability or the soundness of the decision in the Stitzer case. There was an absence of pleading and proof in that case to the effect that upon a final settlement the Government neither had nor asserted any claim whatsoever against the contractor or his surety, and in this material respect that case is distinguishable from the one at bar, and therein the court pertinently said:

> "*The case might be different were there no other interested party.*" (182 Fed. Rep., 513, 517.)

That expression has direct application here, because, the Government ceasing, upon the final settlement, to have any interest, *all interested parties were before the court.*

The decisions we cite in support of the foregoing proposition do not directly involve the question, but it does appear therefrom that in the disposition of cognate questions the statute has been given a liberal construction in order to promote its remedial purposes, and we submit that they are opposed to the narrow and technical view taken of it by the court in the Stitzer case. The decision in that case interprets the statute as inhibiting the institution of a suit by an individual creditor entitled to the benefit of the bond prior to the expiration of six months from the completion and final settlement of the contract. Such interpretation doubtless is correct, as applied to cases in which the Government upon the final settlement has or asserts a claim against the contractor and his surety, but the statute is not fairly susceptible of that construction when applied to cases in which, in the final settlement, the Government is completely satisfied and neither has nor asserts any claim. Manifestly the statute was not designed to afford an arbitrary immunity of six months either to the contractor or his surety to make the covenanted "prompt payments" to all persons supplying the contractor with labor or materials in the prosecution of the work provided for in his contract. That portion of the statute which provides that "if no suit should be brought by the United States within six months from the completion and final settlement of such contract" was obviously designed to apply only to cases wherein, upon the final settlement, the Government on its own behalf had or asserted a claim against the contractor, as in that event, it being the preferred creditor and being possessed of the necessary legal instrumentalities for the enforcement of its claim, it should have a prior right to give caste and character to the action, and in such event the Government should, moving within the prescribed time, have the sole direction and control of the litigation; but this provision of the statute, it is respectfully submitted, is wholly without application where, as in the case at bar, upon the final settlement the Government was completely

satisfied, and neither had nor asserted any claim whatsoever on its own behalf. It has been distinctly decided in such case that the Government cannot upon its own motion maintain any action on the bond, and that the action must be commenced, if at all, by the individuals for whose use and benefit the bond was given. Such were the decisions under the original act, and the amendment does not change the law in this respect. United States *vs.* Henderlong, 102 Fed. Rep., 2; United States *vs.* National Surety Co., 92 Fed. Rep., 549.

In this case it was alleged, proved, and conceded that the Government had no claim. It was, therefore, under the decisions without authority to institute any suit, either within or without the six-months period. The design and purpose of the statute, therefore, to confer upon the Government, within the six-months period, the supreme right of control and direction of the litigation had nothing upon which to operate, and a delay by the individual creditors of the expiry of the six-months period could not have subserved any legitimate purpose of the enactment. As said by Justice Story, in Green *vs.* Liter, 8 Cranch, 229, 249: "The reason of the rule could not apply to such a state of things, and *cessante ratione cessat ipsa lex.*" The bond was required and given for the dual purpose of protecting both the Government and the supply creditors, and after the Government was settled with to its complete satisfaction the bond then enured solely to the benefit of those who had supplied materials and labor to the contractor necessary to enable him to perform his contract with the Government, and in such case it has been distinctly held that the Government impliedly consents to the use of its name in a suit upon the bond by the individual creditors (Howard *vs.* United States, 184 U. S., 676). The statute requires that such bond shall covenant that the contractor or contractors "*shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such*

contract," and the bond in the case at bar, given in pursuance of the statute, covenants that the contractor "*shall promptly make full payment to all persons supplying him labor or materials in the prosecution of the work provided for in said contract*" (Rec., 52).

The statute affords ample protection both to the contractor and his surety, in that: (1) It requires that there shall be but one suit; (2) that such suit shall be brought in the circuit court of the United States in the district in which the contract was to be performed and executed, and not elsewhere; (3) that such suit should not be commenced until after the complete performance of the contract; (4) that such suit should not be commenced until after the final completion of the contract; (5) that such suit should be commenced within one year after the performance and settlement of said contract, and not later. This ample protection to the contractor and his surety is all that was designed by the statute to be afforded them, and the institution of this suit on January 3, 1910, violated no protection designed by the statute to be afforded the contractor or his surety, for that the work had been completed on October 12, 1909, and on November 11, 1909, a final settlement of the contract had been had, and in that settlement the Government was fully satisfied and the contractor and his surety were discharged and acquitted of any and all liability whatsoever to the Government.

In the Stitzer case it is said:

> "Whether during that period the United States does or does not institute a suit, is a matter of entire indifference, in so far as the proper construction of the statute is concerned. It is sufficient for our purpose to say that during that period, and all of it, the only right of action on a bond given under that statute is vested exclusively in the United States" (182 Fed. Rep., 516).

We concede that this enunciation, as applied to a case in which, upon final settlement, the Government has or asserts

a claim upon its own behalf, is correct, because in such event the Government, having supreme right of control, is given six months in which to exercise that control; but we deny its application to a case in which, upon final settlement, the Government is fully satisfied and has no claim, and, therefore, will not, and cannot, either within or without the six-months period, institute or maintain any action whatsoever upon the bond. Manifestly Congress did not design that after the completion of the work and final settlement, the contractor and his surety should have six months' additional time within which to make payment to persons supplying labor and materials. Such contention is opposed, in our judgment, both to the spirit and language of the act. The act requires the contractor to execute the usual penal bond with good and sufficient sureties, with the additional obligation that he shall promptly make payments to all persons supplying him with labor or materials necessary in the work provided for in said contract, and the bond in question is so conditioned. In so far, then, as the language of the act and the bond given in pursuance thereof is concerned, it manifestly appears that no element of delay was contemplated, either by the legislative mind or by the contracting parties, and that it was not the intention of the enactment to extend an arbitrary immunity from suit for six months to the contractor or his surety for the recovery of that which they covenanted to promptly pay. The contrary contention is opposed to the express language of the statute and the bond given in pursuance thereof, and is in antagonism to the true intent and spirit of both. When the contract is completely performed and final settlement thereof has been made to the complete satisfaction of the Government, the contractor thereupon receives from the Government all that is coming to him under the contract, and he is therefore then, in the eyes of the law and of the obligation created by the bond, in as good a situation as he will ever be to discharge his indebtedness for labor and materials which enabled him to

complete his contract. There exists no reason for insisting upon an arbitrary stay of six months, because during that period the contractor could reap from the Government no further fruits from his completed and settled contract. It has been suggested that perhaps the six-months period was reserved for the purpose of enabling the Government within that time to ascertain whether or not there existed in its favor any claim against the contractor and his surety which was neither known nor discoverable at the time of the final settlement. In the brief (pages 12 and 13) of opposing counsel, filed in the Court of Appeals, it is said:

> "For instance, the Government might have discovered that a fraud had been perpetrated by the contractor in the construction of the work or that latent defects existed in certain materials used by him, or that the contractor had failed to comply with material plans and specifications by reason of which the United States was entitled to a recovery."

This suggestion is entirely without force, for the reason that the contract was performed under the supervision of the Government's engineers and inspectors, and whilst the contract provided that until final inspection and acceptance of the work no prior inspection or payment should be considered as a waiver, yet it is therein distinctly provided that the final inspection and acceptance of the work by the Government's officials should constitute a fulfillment by the contractor of his contract (paragraph 9 of the contract, Record, p. 49). The six months delay, therefore, could not possibly subserve any such remote purpose as that conjectured by opposing counsel. The act does in express terms protect the contractor and his surety from suit by individual creditors prior to the complete performance of the contractor, and also prior to the final settlement thereof, but after the contract has been fully performed, and after the contractor has had a full, complete, and final settlement with the Government in which the Government is completely satisfied, and ceases

to have any interest in the matter, it is, under a proper interpretation of the act, open to the individual creditor to sue upon the bond. This satisfies every ascertainable object and purpose of the law; it accords the contractor and his surety the protection the statute designed to afford them; it in nowise interferes with the orderly administration of governmental affairs because the Government no longer has an interest, and it affords the individual creditor the security which the statute designed he should have. We submit any other construction of the statute would sacrifice its intention and purpose to mere literalism; that it would evolve from the statute an inhibition by implication which in the light of its beneficent purposes does not exist. For instance, the literalism of this statute would seem to require, as a condition precedent, that an individual creditor cannot sue upon the bond unless he presents a prescribed affidavit for that purpose and obtains from the Department a certified copy of the contract and bond "upon which he or they shall have a right of action." Such condition precedent, thus suggested by the literalism of the statute, as opposed to its spirit and purpose, was presented to and repudiated by this court in Title Guaranty & Trust Co. *vs.* Crane Co., 219 U. S., 24.

It is true that this court, in United States Fidelity & Guaranty Company *vs.* Struthers Wells Company, 209 U. S., 306, 316, said:

> "There is another most important amendment, by which the materialman's right to sue is suspended until after the completion of the work and final settlement and *for six months thereafter, during which the United States can alone sue upon the bond.* Instead of a right to sue at once upon the non-payment of his claim, he is precluded from doing so perhaps for years."

The question before the court in that case was simply whether the original or the amended act applied. The question here presented was not therein involved. Obviously,

the right of the materialman to sue upon the non-payment of his claim is suspended until the occurrence of three events: (1) the completion of the contract; (2) the final settlement, and (3) the expiry of six months, *provided that upon the final settlement the Government has or asserts any claim against the contractor or his surety.*

We think the expression of this court above quoted is based upon the assumption of a final settlement which results in the existence of a claim upon the part of the Government. As applied to a final settlement, resulting in the extinguishment of any claim upon the part of the Government, it would be the equivalent of construing the statute as prohibiting any suit by any one whomsoever within six months after the completion of the work and final settlement of the contract, because the Government, asserting no claim, could maintain no suit; and if the materialmen have in such event no right to sue, then it plainly follows that no suit could be instituted by any one within six months after the final settlement. The statement that during the six months following the final settlement "the United States can alone sue upon the bond" necessarily presupposes either the existence or assertion of a claim upon the part of the Government and can have no possible application where it is alleged, proved, and conceded that the Government asserts no claim whatever. The United States can maintain a suit upon the bond upon their own initiative and for their own benefit only where they have a claim in their own right. Where they have no claim, the materialmen and laborers must themselves institute their own suit. The bond in this case, originally designed to secure both the Government and the individuals furnishing the contractor with labor and materials, survives the final and satisfactory settlement with the Government solely as an obligation for the use and benefit of the materialmen and laborers. Such being the case, the contention that Congress intended to arbitrarily shield the contractor and his surety for a period of six months is palpa-

bly opposed to the spirit, purpose, and language of the enactment.

Obviously the reason for the provision of the statute in question was to afford the Government, the prior creditor, a reasonable time within which to prepare, institute, direct, and control such proceeding as it might deem expedient for the protection of its own interests; but as in this case it has no interests to protect, and that fact being averred, proved, and conceded, then the reason for the delay ceases, and an arbitrary stay of six months could but result in injustice to the labor and material men and would confer an immunity upon the contractor and his surety beyond the contemplation either of the legislative or the contractual intent.

The second question certified is this:

> **"If the original bill was prematurely filed, was a right of action saved to the parties, so filing the same, by the intervention of Illingsworth, which was filed after the six months' but before the expiration of the twelve months' period, and the amended bill, filed more than one year after the completion and settlement of the contract between the Government and the contractor?"**

This question involves two inquiries: (*a*) the legal effect of the Illingsworth intervention, and (*b*) the amended bill filed by the relators more than a year after the completion and final settlement of the contract. These in their order.

First Proposition.

The Illingsworth bill, seasonably filed on his own behalf and for the use and benefit of each and every of the relators herein by name, incorporated therein by express reference the bill previously filed by the relators, and even though it should be held that the bill of relators was prematurely filed, yet it became a part of the Illingsworth bill and supplied the

details of the claim of the respective relators, and it should have been treated as an intervention in the Illingsworth suit.

Second Proposition.

The Illingsworth bill, being in the nature of a creditor's suit, enured to the benefit of the relators herein and the subsequent dismissal thereof by Illingsworth did not affect them.

Statement.

On April 29, 1910, W. Illingsworth filed his motion herein wherein, after making specific reference to the bill previously filed by the relators herein and to the proceedings had thereon, he prayed as follows:

> "Your petitioner has prepared and presents herewith his petition of intervention in said case drawn in all respects as a petition of intervention or as an original bill as required by said act of Congress; but in order that he may more literally comply with the apparent requirements of said act of Congress as to time of filing same, and also comply with the orders of this honorable court, he prays that he be exempted from the requirements of said order of this court, notifying them of their right to file same by the May term, 1910, of this honorable court, and that he have an order to the clerk of this court permitting his said plea of intervention and petition be filed after May 15th, 1910, and not later than such day as the court may name. As he will ever pray." (Page 145, Record.)

Said motion was granted and the clerk was ordered to file the Illingsworth bill after May 15, 1910, that being after the expiry of six months from the completion and final settlement of the contract (Record, 147). Thereafter, on May 25, 1910, in pursuance of such order, Illingsworth filed his intervention, which constituted a complete bill (Record, 149-

159; Certificate, pages 2 and 3). That bill, so seasonably filed, was for and on behalf of Illingsworth and each and every of the relators herein by name. Said bill begins as follows:

> "Comes now the United States of America, suing for the use and benefit of Texas Portland Cement Company, Jones Lumber Company, the Kansas City Wire and Iron Works Company, Moser Manufacturing Company, Jacksboro Stone Company, Fulton Bag and Cotton Mills, Clem Oil Company, and W. S. Kirby, and others intervening in the above styled and numbered cause, among whom is W. Illingsworth, intervenor, for and in his own behalf, complaining of D. C. McCord and the National Surety Company of New York, W. Illingsworth, intervenor, represents in his own behalf as follows:" (Record, 148).

The Illingsworth bill *by express reference incorporates therein as a part thereof the bill previously filed by the relators herein.*

It avers:

> "That said contract was to be performed in the Northern District of the State of Texas, a substantial copy of said contract, marked Exhibit 'A,' is attached hereto, showing the witnesses thereto and showing more in detail its terms, conditions and covenants and manner of execution; *the original (or one of the originals is attached to the original petition filed in this cause on January 3rd,* 1910, *said petition filed by Messrs. Etheridge & McCormick, attorneys for relators hereinbefore mentioned, and your petitioner here begs permission to refer to same, and makes same a part of his intervention, and will introduce the said original, or one of same, or a duly certified copy, as evidence on final trial."* (Record, 150.)

Said bill concludes with this prayer:

> "He further prays for such personal notice as the court may order be given to all known creditors and also for notice by publication as provided by said act

of Congress heretofore referred to, made and provided in such cases, *in the event the court should think the service of citation and notices of publication already had on the original petition filed in this case is not sufficient compliance with said statute. He further prays that if the recovery on the bond herein sued on should be inadequate to pay the amounts found due to all creditors recovering judgment in this cause on said bond, that each creditor have judgment pro rata of the amount of the recovery against the bond and surety as provided by law.*" (Record, 154.)

The respondent, National Surety Company, appeared and answered the Illingsworth bill (Record, 172). The relators herein duly excepted to the dismissal of their suit, among others, upon the following ground:

> "Because an appropriate suit and intervention was duly filed herein by W. Illingsworth for himself and all other creditors, after the expiration of six months from the completion of the work and the final settlement with the United States in relation thereto, and prior to the expiration of twelve months therefrom, and such intervention was in all respects sufficient as a suit in this cause, and if the plaintiffs' suit was premature, their petition in any event should have been considered as an intervening petition seasonably filed." (Certificate, page 4);

and such error was duly assigned (Specification 5, Record, 230, 231; Specification 7, Record 231, 232).

Authorities.

Richmond *vs.* Irons, 121 U. S., 27.
Nix & Storey *vs.* Dukes, 58 Tex., 96.
Foote *vs.* O'Roork, 59 Tex., 215.

ARGUMENT.

The Illingsworth bill, by express reference thereto, incorporated therein and made a part thereof the bill which was filed on January 3, 1910, by the relators herein. It prayed for new or additional service "in the event the court should think the service of citation and notices of publication already had on the original petition filed in this case is not [a] sufficient compliance with said statute" (Record, 154). The intervention of Illingsworth "constitutes a complete bill and has attached to it as exhibits the contract and the bond with appropriate allegations of the breach thereof and the consequent liability of the principal and surety" (Certificate, pages 2 and 3). It was filed May 25, 1910, more than six months after the completion of the contract and final settlement thereof and within twelve months therefrom. It is in the nature of a creditor's bill and purports to be filed for the use and benefit, by name, of all the relators named in the original petition, which was filed on January 3, 1910, and concludes with an appropriate prayer for a *pro rata* distribution of the fund in the event it should prove insufficient to pay all the creditors in full.

The act of Congress, under and in accordance with which this bill was filed, distinctly provides that "only one action shall be brought, and any creditor may file a claim in such action and be made a party thereto within one year after the completion of the contract, and not later." At the time of the filing of this complete original bill by Illingsworth, the original petition of the relators herein was on file, and the Illingsworth bill was filed expressly on their behalf, and by reference incorporated said petition therein, and thereupon the original bill previously filed became in law a part of the Illingsworth bill, and supplied the details of the respective claims of the relators herein, and the fact that the Illingsworth bill was subsequently dismissed by him did not affect

the legal status of the action as to the remaining parties. Such, clearly, is the rule in Texas, as manifestly appears from the decision in Nix & Storey *vs.* Dukes, above cited, and that decision, we submit, accords with the decision in Richmond *vs.* Irons, above cited.

The fact that the relators' original petition was filed on January 3, 1910, did not preclude it from operating as an intervention in the suit of Illingsworth, filed on May 25, 1910. The original petition could have been refiled as of May 25, 1910, and such formal refiling unquestionably would have made it an appropriate intervention. The omission to refile is a mere technical matter which is not involved. The original bill supplied the details of the respective claims of the parties, and should have been looked to for that purpose, as by express reference thereto it was incorporated in and became a part of the Illingsworth bill. United States *vs.* Massachusetts Bonding Co., 198 Fed. Rep., 923.

The familiar doctrine of the legal effect of the filing of a creditor's bill for and on behalf of a number of creditors by name, and the subsequent dismissal thereof by one of such creditors, applies with full force and effect in this case, because the statute both permits a use action and prohibits a multiplicity of actions. At the time of the dismissal of relators' case as to both defendants, the Illingsworth suit was pending except as to Illingsworth individually; all of the parties were before the court, and the relators duly excepted to the dismissal of their action, and such dismissal was, therefore, in any event, fundamentally erroneous.

The second inquiry involved in the second question certified relates to the effect of the amended bill filed by the relators more than one year after the completion and settlement of the contract between the Government and the contractor, and with reference thereto relators propound the following:

First Proposition.

Even though it should be held that the suit of the relators herein was prematurely instituted, yet the contingency which matured the cause of action having happened prior to the dismissal thereof, the only effect would be to cast the relators in the cost of the action up to the time of the occurrence of the contingency which matured the same.

Second Proposition.

The institution of the suit, even though premature, arrested limitation, and the amendment subsequently filed following the happening of the contingency cured the defect.

Third Proposition.

The relators' amended original petition merely elaborated the allegations of their original petition, and did not constitute a new suit after the expiration of one year from the completion of the contract and the final settlement with the Government.

Authorities.

Kaufman *vs.* Wooters, 79 Tex., 205, 214;
Burns, Walker & Co. *vs.* True, 5 Tex. Civ. App., 74;
Kinney *vs.* Lee, 10 Tex., 155;
Crescent Ins. Co. *vs.* Camp, 64 Tex., 521;
Morgan *vs.* Bement, 24 Tex. Civ. App., 564;
Queen Ins. Co. *vs.* May, 35 S. W. R., 829;
Howard *vs.* Windom, 86 Tex., 560;
Becker *vs.* Railway Co., 80 Tex., 486;
Railway Co. *vs.* Kinman, 58 Pac. Rep. (Kan.), 1037;
Seaton *vs.* Hixon, 35 Kan., 663;
Hall *vs.* Hurd, 40 Kan., 374;
Barrow *vs.* Shield, 13 La. Ann., 57;
Titus *vs.* Poole, 145 N. Y., 414;
Conolly *vs.* Hyams, 176 N. Y., 403;
Meekins *vs.* Railway, 3 L. R. A. (N. S.), 294.

ARGUMENT.

It is settled law in Texas that when a petition is simply bad on demurrer on account of its prematurely declaring upon a demand, it will, nevertheless, prevent the running of the statute of limitation, and that an amended petition filed after the maturity of the demand which does not introduce a new cause of action operates to cure the defect of the premature institution of the action. In such cases it is held that the defendant may cast the plaintiff in the cost of the premature action incurred prior to the happening of the contingency which matured the cause of action. Even though it should be held that the relators' original petition, filed in this case on January 3, 1910, was premature, and that their cause of action did not mature until six months after the completion of the contract and the final settlement with the Government, yet thereafter, on January 10, 1911, they filed an amended original petition. This amended original petition was filed after the lapse of the time which matured the cause of action, and it was on file prior to the time the court dismissed the action as to either of the defendants, upon the ground that it had been prematurely instituted. This proposition was urged upon and considered by the trial court, but it was rejected upon the ground that the amended petition was not filed within one year after the expiration of the completion of the contract and the final settlement with the Government. The court said:

> "The records of this court reveal that on the — day of January, 1911, and during the present term of this court, the plaintiffs filed their first amended original petition upon the relation of the Texas Portland Cement Company, in lieu of their original petition filed herein on the institution of this action. It appears, and it is admitted, that the amended petition was filed after the expiration of the time within which the act authorizes the institution of an action.

It was urged by counsel for plaintiff that beginning the action and filing the petition, though done prematurely, saved to them their cause of action; that such premature beginning was cured by the filing of their amended original petition instead and in lieu of their original petition.

"Greater weight might be given this suggestion had the amended petition been filed during and not subsequent to the time in which their suit might have been instituted under the act. The amendment was filed at a time when their action was barred by the limitations fixed by the terms of the act. If the construction placed upon this act by the court in Stitzer *vs.* United States is correct, I seriously doubt the efficacy of the filing of the plaintiffs' original petition at the time it was filed, even for the purpose of saving to them their cause of action, the same to be vitalized by the subsequent filing of an amendment" (Record, 208, 209).

From this it appears that the trial court treated the amended petition as the institution of a new suit and filed without the time allowed by law, whereas it introduced no new cause of action whatsoever, but constituted a mere elaboration of the allegations of the original petition, together with appropriate averments showing the maturity of their cause of action, if it were immature at the time of the original institution of the suit. We submit that in this ruling the trial court went in opposition to the settled law of the State of Texas. We further submit that no such question arose in or was decided by the court in Stitzer *vs.* United States. In Texas the law is this: If A sues B upon a promissory note prior to its maturity, and the action is not dismissed, but pends, and thereafter A amends his petition setting up the maturity of the note, although such amended petition be not filed until after four years from the maturity of the note, it saves the action. Foote *vs.* O'Roork, above cited, supports this proposition. The lapse of time prior to the filing of an amended petition in an action in Texas does

not affect it, unless the character of the amended petition is such as to change the cause of action or to introduce a new and distinct cause of action not presented or attempted to be presented by the original pleading. This proposition is distinctly supported by the case of Becker *vs.* Railway Company, above cited, wherein the Supreme Court of Texas says:

> "When the petition is simply bad on demurrer, on account of stating the cause of action defectively, it will prevent the running of the statute of limitation nevertheless, and curing the defects therein by amendment does not ordinarily amount to a new suit or an abandonment of the original, unless a new and distinct title is invoked by the amendment."

And in that case, as pertinent to the case at bar, the court said:

> "Such is not the attitude of the plaintiffs in this suit, as shown by the two petitions. We repeat that both petitions set up the same right and title to the property, and in the company, not in the plaintiffs individually or in their representative character, except in subordination to the company. We think that all of these decisions above cited, and others of like import on that question, were based upon the fact that the amendment set up a new title distinct or hostile to that first alleged, or such other facts as did not appear from the original pleading, and which constitute a new and different cause of action."

The above propositions are supported by Howard *vs.* Windom, above cited. In that case Justice Gaines said:

> "It is earnestly insisted on behalf of defendant in error that because the promise contained in that letter was not pleaded in its proper place and because that pleading was stricken out upon exception, it should be treated as of no effect for any purpose, and that the promise should be deemed as having been set up for the first time in the amended original petition. But in this conclusion we do not concur. The supple-

mental petition, as it is named, contains all the substantial averments of a petition upon a new promise with an appropriate prayer for relief. But it does not contain all of the formal allegations required by the statutes and rules of this court either for an original or an amended original petition. If filed as an amended original petition, it should have been held bad upon special exception. *But in such a case a subsequent amended petition which complied with the statutes and rules could not have been deemed a new suit. Although the first amendment had been held bad upon general demurrer, its filing would have still been properly treated as the commencement of the action.* Kaufman *vs.* Wooters, 79 Tex., 205, and cases there cited."

In Burns, Walker & Co. *vs.* True, above cited, the Court of Civil Appeals for the Second District, speaking through Judge Head, says:

"If plaintiff's cause of action had not accrued at the time his original petition was filed, the defect was cured by filing the amendment more than a year thereafter. (Culbertson *vs.* Cabeen, 29 Tex., 254; Cox *vs.* Reinhardt, 41 Tex., 594.) No complaint is made of the failure of the court to tax the costs accrued prior to the filing of this amendment against the plaintiff. (Dalton *vs.* Rainey, 75 Tex., 516.)"

In Kinney *vs.* Lee, above cited, suit was brought on a conditional promise without averment of the happening of the conditions, but afterwards, and after four years, an amendment was filed which averred that the condition had happened: held that limitation was interrupted by the filing of the petition.

In Crescent Ins. Co. *vs.* Camp, above cited, suit was instituted upon a policy under the terms of which the company had sixty days after the receipt of the proofs of loss in which to pay. The suit was instituted prior to the lapse of that time. The court said:

"It was proven, however, that less than sixty days before the suit was filed proofs were forwarded to the

company. Nearly two years after the proof was forwarded before the trial, and the plaintiffs could readily have relieved the case of all this embarrassment by filing an amended original petition containing the proper averments. *The fact then that the suit was originally commenced before the maturity of the demand would only have affected the question of costs.*"

In Morgan *vs.* Bement, above cited, it appears that the suit was filed upon notes before they were due. Pending the suit the notes became due, and the plaintiff amended. The court said:

> "It is true that when the suit was filed the notes were not due, but they became overdue before plaintiffs' supplemental petition was filed, and were long past due at the time of trial, and were still unpaid, which facts, according to the terms of the notes, made them payable in Waco, McLennan County, where the suit was pending. These facts conferred jurisdiction upon the McLennan court. The costs accruing prior to the acquiring of the jurisdiction of the McLennan court were stated and charged to plaintiffs. This is all that defendants could ask and all that they were entitled to."

In that case the defendants were sued without the county of their residence, and the only fact giving jurisdiction in McLennan County was the stipulation in the notes that after their maturity they should become due and payable therein.

In Queen Insurance Co. *vs.* May, above cited, suit was instituted upon a policy before the lapse of sixty days after proofs of loss were made. The court said:

> "Sixty days had not elapsed after the proofs of loss were furnished to the company before the original petition was filed, but more than sixty days after they had been furnished appellee filed an amended petition in which she averred that the proofs of loss had been duly made to and received by appellant, and after the expiration of sixty days thereafter she had made demand of payment. By the amendment appellee showed that she was entitled to maintain the

> suit, and the objection that it was prematurely brought would become only a question of costs, which was not raised."

In Railway Co. *vs.* Kinman, above cited, it was held that an action, although prematurely brought, prevents the statute of limitation from running.

It is therefore respectfully submitted:

1. That under a correct interpretation of the act of Congress, as applied to the facts of this case, the suit filed on January 3, 1910, was not premature;

2. That even if the suit filed on January 3, 1910, was premature, yet that defect was rendered immaterial by the seasonable filing of the Illingsworth suit; and

3. That even if the original suit was premature and such defect was not cured by the Illingsworth suit, yet the amended petition, filed prior to the dismissal of the action, saved the same, and that the action should not have been dismissed, as the defect, if it existed, affected only a question of costs, which was not raised.

It is therefore respectfully submitted that both questions certified should be answered in the affirmative.

Respectfully submitted,

FRANCIS MARION ETHERIDGE,
JOSEPH MANSON McCORMICK,
Attorneys for the United States of America upon the Relation of and for the Use and Benefit of Texas Portland Cement Company, Jones Lumber Company, Kansas City Wire & Iron Works Company, Mosher Manufacturing Company, Jacksboro Stone Company, Fulton Bag & Cotton Mills, Clem Oil Company, and W. S. Kirby.

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(23,168)

SUPREME COURT OF THE UNITED STATES

October Term, 1913.

No. 234.

THE UNITED STATES UPON THE RELATION AND FOR THE USE AND BENEFIT OF TEXAS PORTLAND CEMENT COMPANY, ET AL.,

vs

D. C. McCORD AND NATIONAL SURETY COMPANY OF NEW YORK.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF DEFENDANT IN ERROR NATIONAL SURETY COMPANY.

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The defendant in error, National Surety Company, suggests to this Court that the Circuit Court of Appeals is without jurisdiction of this cause, and that therefore this Court is without jurisdiction thereof on certificate. It is therefore submitted that the certificate should be dismissed, with instructions to the Circuit Court of Appeals to dismiss the writ of error.

FIRST PROPOSITION.

There can be no review in this Court or in the Circuit Court of Appeals upon a writ of error upon an alleged error in ruling upon any plea in abatement, other than a plea to the jurisdiction of the Court.

AUTHORITIES.

Revised Statutes, Sec. 1011;
Piquignot vs. Penn. R. R. Co., 16 Howard, 104;
Stephens vs. Monongahela Bank, 111 U. S. 197;
Leitensdorfer vs. Webb, 20 Howard, 176;
Cunningham vs. Rodgers, 96 C. C. A., 508.

ARGUMENT.

Section 1011 of the Revised Statutes provides that there shall be no reversal in the Supreme Court or any Circuit Court, upon a writ of error, for error in ruling upon any plea in abatement, other than a plea to the jurisdiction of the Court, or for any error in fact.

This statute was first construed in the case of Piquignot vs. Penn. R. R., 16 Howard, 104, where it was held that the judgment of the Court below, upon a demurrer to a plea in abatement, which judgment was in favor of the defendants, was not subject to revision on writ of error.

In the case of Stephens vs. Monongahela Bank, 111 U. S., 197, there was judgment in the Court below, not only disposing of the plea in abatement, but disposing of the case on its merits, because of want of sufficient affidavit of defense. The Supreme Court declined to review the action of the trial Court on account of Section 1011.

In the case of Leitensdorfer vs. Webb, 61 U. S., 176, there was a plea in abatement to a writ of attachment. There was a judgment in favor of the plaintiff upon both

the plea and upon the merits. The case arose in the Territory of New Mexico. The Supreme Court said:

> "From this provision (Sec. 1011) in the Act of Congress it follows that the preliminary proceedings in the District Court of the Territory, being in its nature interlocutory, and designed to abate the particular remedy of attachment only, and having no application to the plaintiff's right to a recovery of his demand, or to the jurisdiction of the Territorial Court, either as to the parties or the subject matter of the controversy, that proceeding comes not within the appellate or revisory power of this Court."

In Cunningham vs. Rodgers, 96 C. C. A., 508, plaintiff brought suit, alleging himself to be an administrator of a certain estate. To this complaint the defendant interposed a plea in abatement, denying that the plaintiff was then or ever had been, administrator of the effects in China of the deceased, and prayed that the petition be dismissed. To the plea in abatement the plaintiff demurred, and upon issue thus joined the Court rendered an opinion sustaining the plea in abatement, but making no further order or judgment in the case. The Circuit Court of Appeals declined to take jurisdiction.

SECOND PROPOSITION.

The matter presented in the plea, constitutes a plea in abatement, as that term is technically used in Section 1011 of the Revised Statutes.

ARGUMENT.

It is elementary that any fact showing a want of capacity on the part of the plaintiff to sue con be set up by a plea in abatement. Also that the objection that the action is prematurely brought must be raised in abate-

ment (See Encyclopedia of Pleading and Practice, Vol. 1, pages 10 and 22). In the case at bar, as is shown by the printed certificate, printed page to 2, "The National Surety Company filed what it termed its 'Plea in Abatement,' upon the ground that the suit was brought in the name of the United States, without authority of law, and that the plaintiffs had no cause of action, because six months had not intervened between the completion and final settlement of the contract and the filing of the suit."

THIRD PROPOSITION.

The "judgments" in this case are rulings upon a plea in abatement as that term is technically used in Section 1011 of the Revised Statutes.

The printed certificate, page 4, shows that the following action was taken upon the Plea in Abatement:

> "On February 22d, 1911, the plea or demurrer of the National Surety Company was heard and tried upon an agreement to the effect that the contract referred to in plaintiffs' petition was performed and completed on the 12th day of October, 1909, and that thereafter, on to-wit: the 11th day of November, A. D. 1909, a final settlement of said contract was had between the United States and the contractor, D. C. McCord, and it was further agreed that the United States thereafter neither had nor asserted any claims, demands, or causes of action against either the said contractor or the National Surety Company by reason of said contract and bond mentioned in the plaintiffs' petition, and upon consideration thereof by the Court it was ordered, adjudged and decreed that the

said plea be sustained, and the cause was dismissed as to the National Surety Company, with its costs. Thereafter, on May 26th, 1911, the cause was dismissed as to the defendant, McCord, upon the ground that the suit was instituted prior to the expiration of six months from the completion of the work and the final settlement with the government, and that, therefore, the action was not maintainable upon the bond sued upon."

It will be observed that the above quoted excerpt from the certificate speaks of this plea as a "plea or demurrer." It is submitted that, while it is probably true that defendant had the right to raise this question by a demurrer, the record shows that it elected to raise it by a plea in abatement. The certificate distinctly shows that the National Surety Company termed its pleading a "Plea in Abatement;" it further shows that it was sustained as a "plea," and the cause was accordingly dismissed. The plea itself, as originally filed, is found on page 161 of the record, as filed in the Circuit Court of Appeals, which record has been transmitted to this Court.

FOURTH PROPOSITION.

There is no final judgment in this case, and no order made herein, which is subject to review by this Court, or the Circuit Court of Appeals.

ARGUMENT.

The only order made in this case, other than those disposing of the National Surety Company and McCord, as shown by the certificate, and also shown by the record, is that dismissing the petition and intervention of W. Illingsworth, in reference to which the printed certificate, page 4, shows the following proceedings were had:

"On February 2d, 1911, the intervener W. Illingsworth, dismissed his intervention, and thereafter the Court ordered that his petition and petition in intervention be dismissed with costs."

I.

The action of the Circuit Court in sustaining the plea in abatement was upon authority of the case of Stitzer vs. U. S. ex rel, 182 Fed. 513, 105 C. C. A. 51, Circuit Court of Appeals, Third Circuit. The opinion in that case needs no elucidation. Neither is there any doubt but that it is applicable to the case at bar. It holds fairly and squarely that in cases of this kind, instituted in the name of the United States by individuals, there is no authority to use such name until the expiration of six months from the completion and final settlement of the contract, and that no cause of action in favor of individuals has accrued until the expiration of such time, and that the filing of such suit prior to the expiration of such time is premature and fatal to the maintenance thereof.

While this is the first and only direct construction of the statute upon this question, it is nevertheless in harmony with utterances in other cases where such a construction has been indirectly involved. This Court, speaking through Mr. Justice Peckham in the case of the United States Fidelity & Guaranty Co. vs. United States, ex rel, 209 U. S. 306, 52 L. E. 808, said:

"There is another most important amendment, by which the materialman's right to sue is suspended until after the completion of the work and final settlement and for six months thereafter, during which the United States can alone sue upon the bond. Instead of a right to sue at once upon the non-payment of his

claim, he is precluded from doing so, perhaps for years."

In the case of Engineering Co. vs. Winkler, 162 Fed. 397 (1908), the Church Construction Company as principal, and the Metropolitan Surety Company as surety, filed their bond, the condition of which was exactly the same as the condition of the bond in the case at bar. The plaintiff at the request of said construction company furnished it with labor and material. The construction company became insolvent and abandoned its contract with the United States. Six months elapsed and no suit having been brought by the United States, the plaintiff instituted suit in the name of the United States to its use and benefit, against the receiver of the construction company and the surety, in accordance with the provisions of the Act of 1905, for the amount due it. Held:

"It is clear (under the act) that certain events must happen, certain things be done, before a right of action arises on such bond against the surety in favor of a person supplying labor and materials to the contractor in case the United States does not bring suit. What are they? First: The United States has six months from and after the completion and final settlement of said contract in which to bring suit on such bond. If the six months elapse after such completion and final settlement of said contract, and the United States has not sued thereon, then such person who has supplied material for which payment has not been made may sue in the form provided. * * * The statute is explicit that, before, any such creditor can bring suit on the bond, there must be (1) a complete performance of said contract; and (2) final settlement thereof. * * * The bond and statute are to be read together. While the bond is in-

tended for the benefit of both the United States and persons furnishing material, etc., the remedy of the latter is in the cases, and in the way prescribed. The courts can not change the statute or add to the liability of the surety. The surety contracted with reference to the statute and can not be sued on its bond by a person who furnished material to the contractor, except in the cases and on the conditions and on the happening of the events named. * * * I do not see any basis for the contention that the United States has waived its right to bring an action at the proper time. But suppose it has, that mere fact gives no right of action to the Watson-Flagg Engineering Company against the surety company. * * * I think that the amendatory act was passed for the purpose of preventing premature actions by materialmen."

In the case of United States vs. McGee, 171 Fed. 209 (1909), the Court in construing the particular part of the act under discussion in the present case, said (page 210):

"The next provision is that, if no suit should be brought by the United States within six months from the completion and final settlement of said contract, that such claimants under conditions prescribed by the statute, may have a right of action in the name of the United States in the Circuit Court of the United States in the district in which said contract was to be performed and executed. In respect to this latter provision, it is to be observed that the independent suit the creditors may bring upon the surety bond shall not be commenced until after the complete performance of said contract and final settlement thereof. So long as the contract is not completely performed and final settlement thereof made between the contracting parties, no right of independent action accrues to the

materialmen and laborers. When that condition exists, and the United States has failed for six months to bring any action on the bond, the creditor may proceed, provided he commences his action within one year from the performance and final settlement of the contract."

In the case of Williamson Bros. Co. vs. United States Fidelity & Guaranty Co., 171 Fed. 247 (1909), the action was upon the joint and several bond of the defendant and the Neafy & Levy Ship & Engine Building Company to the United States, dated June 26, 1903. One of the conditions of the bond was that the defendant's co-obligor should "promptly make full payments to all persons supplying labor or material in the prosecution of the work provided for in said contract." Williamson Bros. Co. supplied machinery, which was not paid for. The bond was given pursuant to the provisions of Act of August 13, 1894. Williamson Bros. Company furnished the machinery in June and July, 1904. On October 31, 1904, the steamers having been completed, the United States paid to defendant's co-obligor the amount due on the contract. On February 24, 1905, the Act of 1894 was amended. The defendant in its affidavit of defense contended that the limitation as to the time within which an action must be brought upon the bond, as contained in the amendatory Act of 1905, was applicable to its case. The affidavit was held to be fatally defective. Circuit Judge Lannnig in construing the Acts of 1894 and 1905 said:

"The act of 1894 prescribed no limitation of time within which action may be commenced on the bond. The Amendatory Act of 1905 gives to the United States the exclusive right to commence action on the bond for period of six months from the completion and final settlement of the contract. After the ex-

piration of the six months, if the United States has within that period commenced no action, and within one year from such completion and final settlement any materialman or laborer may commence an action on the bond. The Act of 1905 amends the Act of 1894 in several very important particulars. The amendments relate both to procedure and to substantive rights. * * * By the Act of 1894 a cause of action accrued to Williamson Bros. Company immediately upon default in payment of the amount due for the machinery furnished. * * * It will be observed, then, that if the Act of 1905 be construed to apply to the present cause, the right of Williamson Bros. Company to commence suit, which accrued in 1904, was suspended on February 24, 1905, upon the passage on that date of the amendatory act, until April 30, 1905, which was six months after October 31, 1904, when final settlement of the contract was made by the United States."

The decision in the Stitzer case and in the case at bar is clearly supported by such precedents as have been established.

It is true that it is the intention of the act and of all legislation of which it is amendatory to first protect the United States and then require pro tanta the payment for material and labor which has been furnished for the construction of public works, but the present act is restrictive in its terms compared with the act of which it is amendatory. The differences are succinctly set forth by Mr. Justice Day in the case of Markin vs. U. S. ex rel, 215 U. S. 533, 54 L. E. 317, where he says:

"The present action accrued after the passage of the statute of February 24, 1905, amending the act of August 13, 1894, in which original act a right of

action was given in the name of the United States for the use and benefit of the persons supplying the labor or materials in the prosecution of the work provided for in the contract, and requiring a bond for the benefit of such persons. In that act there was no limitation upon the number of actions which might be brought, nor was there any preference given to the United States in a recovery upon the bond. In the amended act a single action was provided for, and priority was given to the claim and judgment of the United States. In such suit any person or company who had furnished labor or material or material used in the construtcion or repair of any public building was allowed to intervene in the suit by the United States on the bond, and to have their rights and claims adjudicated; and it was further provided that, if no suit should be brought by the United States within six months of the completion and final settlement of the contract, then the person or persons supplying the labor or materials should, upon filing an affidavit in the department under the direction of which the work had been done, or the materials furnished, be furnished with a certified copy of the contract and bond, and might thereupon bring an action in the name of the United States in the Circuit Court of the United States in the district where the contract was performed and executed. There are other provisions looking to the distribution of the recovery upon the bond, and providing for brniging all creditors into the single suit which is authorized to be instituted."

It will be observed that the act under which the bond at bar was given and which authorized a suit thereon is quite restrictive in its terms as compared with the former statute. The original act placed practically no

restriction upon the right to sue, the number of suits, or the courts in which brought. Neither did it afford the United States any preference or priority. The purposes and intent of the present act are clear. They are, (1) To give the United States a preference and priority right of recovery. (2) To give the United States absolute control of any action brought upon the bond during the first six months after the completion of the contract and final settlement thereof; and (3) to restrict and limit the number of suits to one, prescribing the court having jurisdiction thereof; and (4) to prescribe certain limitations and procedure thereni. The statutory cause of action thus created in favor of materialism is conditioned upon these reasonable and plain restrictions, and the surety herein contracted in reference thereto. The beneficient purpose of affording protection for those who could not protect themselves was given in the former act without any limitations whatever, but by the amended act is it preserved with the conditions and limitations indicated. During the first six months there is to be but one suit and that can be brought by no one except the Government itself. Creditors may have a right to intervene in that suit, but they have no right to control it, and their claims asserted therein are merely secondary to those of the Government. To permit a creditor to institute a suit in the name of the United States during the first six months period is to enable him to prosecute it to judgment during that period, and thus subject the surety to two suits and possibly to two recoveries or else defeat the right of priority given by the act. To say that the surety is subjected to two suits during this period contravenes the spirit and purpose of the act with reference to which it contracted. To say that the Government may thus be defeated of its right of priority is also contrary thereto, and untenable. To prevent more than one suit, and to

protect this right of priority to the Government, it is necessary that the act be construed as reserving to the Government the absolute right to control the suit during the first six months period. This is the only way in which the spirit of the act can be carried out, and while in express terms there is no inhibition against the creditor's suit within six months, such inhibition naturally and necessarily follows in order to carry out the clear purpose of giving the Government priority, and restricting the number of suits to one.

It needs no authority to support the proposition that an individual can not be permitted to maintain a suit in the name of the Government without express authority. The Supreme Court of Louisiana said in the case of the United States vs. Union Bank, 8 La. Ann. 388, that the use of the Government's name for the benefit of others will not be tolerated. This, of course, is the general rule. The action in question was therefore instituted without authority from the United States Government, and in direct contravention of its reserved right to bring and control the suit during the first six months period, and in contravention of the assured right of this surety that no suit would be brought against it during this period except by the Government.

The assumption made by plaintiffs in error in their first proposition that because the United States after said settlement neither had nor asserted any claims, demands or causes of action against the contractor or the surety, that the Government had no right to sue thereon, and the argument that by reason thereof it ceased to have an interest in the bond, and to have any standing to institute, upon its own motion, any suit whatever, is erroneous in that it overlooks the vested right of the Government at any time within six months after it has

made final settlement to make discovery of any of its rights under the bond and bring suit thereon. While it is true that in the case at bar no right of action arose after final settlement, it is likewise true that it was at any time liable to have arisen. For instance, the Government might have discovered that a fraud had been perpetrated by the contractor in the construction of the work, or that latent defects existed in certain material used by him, or that the contractor had failed to comply with material plans and specifications, by reason of which the United States was entitled to a recovery. Many instances of this kind may have arisen. This is the very purpose of giving the Government a vested right in the bond for the period of six months after final settlement. Congress had in mind that usually completion and final settlement would end the Government's interest in the bond, but with a view of protecting the Government against just such contingencies as have been mentioned, it reserved to itself six months in which to further inspect and test the work, and in which to make discoveries of any rights which it may have under the bond, and to bring action thereon.

This assurance given by the law that no suit would be instituted against the surety during this period of six months, except by the Government itself, is a material one from the standpoint of the surety, and affords such surety a substantial right. During this period, the surety has an opportunity to investigate, according to its own desires and purposes, the financial condition of its principal, and to take such steps as it thinks proper to protect itself, either by legal steps or contractual relations with the principal, or the latter's indemnitor. Morover, it has this period in which to investigate the merits of any claims which may possibly be asserted aganst it by those who were given a subsequent right to bring suit upon

the bond. It is also assured that during this six months period, the principal's financial condition will not be put in jeopardy by being subjected to a suit of this character, and it has the further assurance that it will not be put to the expense and trouble of any litigation, except upon motion of the Government, itself, but that in the absence of such it will have this period of time in which to not only investigate the merits of any probable claims, but to make payment or settlement of them.

II.

It is well settled that when a suit is prematurely brought no amendment declaring upon a cause of action which did not exist when the suit was commenced would cure a defect. In the case of the American Bonding & Trust Co. vs. Gibson County, 145 Fed. 871, 76 C. C. A. 155, the opinion being by present Associate Justice Lurton, it is said:

> "If no cause of action existed when the suit was started, there was nothing to amend and when this fact appeared and objection was made, the suit should have been dismissed without prejudice to an action upon the cause of action which did accrue when the architect audited the claim. It was not a case of cause of action defectively stated. Such defect is amendable, neither was it a case of a new cause of action brought in by amendment which existed when the suit was brought. It was an action to declare a recovery upon a cause of action which arose pending the suit. Plaintiff's right to any recovery depended upon its right at the inception of the suit and the nonexistence of a cause of action when the suit was started is a fatal defect, which can not be cured by the accrual of a cause pending suit. * * * When prematurity appears, the suit should be dismissed with-

out prejudice to the right to institute such suit upon the cause of action when it is mature."

The case just cited was one upon a contract which provided the manner in which the costs and damages incident to the default of the contractors and the completion of the building by the owner should be determined, and that no right of action for such costs and damages accrued until the claim had been duly audited and certified by the architect, or a certificate by the architect, or a certificate wrongfully denied upon request. When the suit was brought there was no allegation nor proof that the costs and damages sustained by plaintiff in finishing the building had been audited and certified as thus provided. Pending the litigation the plaintiff amended its declaration so as to show that since the filing of the suit it had caused its claim to be audited and certified without averring or showing that the architect had, before suit was brought, fraudulently refused to audit and certify the same.

III.

Touching the effect of the intervention of W. Illingsworth, this defendant in error advances the following propositions:

1. The case having been instituted prematurely and without authority, it was impossible under the law as announced in the case of American Bonding & Trust Co. vs. Gibson, cited in the preceding paragraph, to cure this erroneous institution of the suit by subsequent proceedings therein.

This suit when instituted by the relators in the name of the United States was for the use and benefit of all interested creditors. Illingsworth was as much a relator at the institution of the suit as he was when he filed his petition in intervention. He simply came in at a later

period with a view of asserting his rghts sought to be preserved to him by the filing of the original petition. If one of the relators actually named in the original petition could not, under the authority of the American Bonding Co. vs. Gibson, hereinbefore cited, amend the petition so as to cure the defect existing by reasons of having instituted the suit without authority, and before the cause of action accrued, how can it be said that an intervenor who is really a relator as much as if actually named in the petition, can cure a defect by so drafting his petition in intervention that it is susceptible of being construed as an amendment of the original petition?

2. The intervention related back to the time of the filing of the original petition, and was therefore of the same force and effect as if it had been filed at the same time the original petition was filed.

All the decisions relating to amendments and interventions are to the effect that an intervention and amendments relate back to the time of the filing of the suit. The authorities cited by the plaintiff in error so hold.

In the case of Carter Crume vs. Peurrung, 99 Fed. 888, 40 C. C. A. 150, th opinion, being by Judge Taft, sitting with Judges Lurton and Day, it is said:

> "As the petition was as amended petition, and not a supplemental petition, it related back to the time of the filing of the original petition, and can not be construed to be the beginning of a new suit as of the date of its filing. In Railroad Co. vs. McLaughlin, 43 U. S. App. 181, 19 C. C. A. 551, 73 Fed. 519, it was held by this Court that an amended petition in every respect like the original petition, except as to the jurisdictional averments, was to be regarded as filed and construed as of the date of the original petition; and two decisions in the Court of Appeals of

the Eighth Circuit were cited to sustain this view. Carnegie vs. Hulbert, 36 U. S. App. 81, 16 C. C. A. 498, 70 Fed. 209; Bowden vs. Burnham, 19 U. S. App. 448-452, 8 C. C. A. 248, 59 Fed. 752. We are clearly of the opinion therefore that the former suit must be regarded as having been begun at the date of the filing of the original petition."

It is therefore apparent that the petition in intervention filed by Illingsworth related back, so far as his rights and so far as the rights of any claiming under it were concerned to the time of the filing of the original petition. Especially is this true in so far as the petition sought in any way to amend the original petition. If the original petition was filed prematurely, then it of necessity follows that Illingsworth, by intervening in this suit and undertaking to amend the original petition, acquired no greater rights than he would have acquired had he been named in express terms as one of the creditors for whose use and benefit the suit was originally brought. Illingsworth could have in no way escaped the vice existing by reason of the premature filing of this suit, except by the commencement of a new and independent action. When he intervened, May 25, the plea in abatement of this defendant was and had been on file since May 3. He found the case prematurely instituted, and a plea interposed seeking to abate the suit.

3. The petition in intervention was not drawn nor intended as a petition in a new suit, but as a petition in intervention with a view of getting the intervenor in court at the proper time.

Attention is invited to the fact that the intervention of Illingsworth does not constitute a complete bill or a complete petition on behalf of all creditors. It is true that the intervention begins and closes as set forth on

page 3 of the certificate. Attention, however, is invited to the fact that in such commencement the said W. Illingsworth declares that he brings the suit for the use and benefit of the original relators and other intervening in the above styled and numbered cause, among whom is himself, whom he described as an "Intervenor for and in his own behalf."

4. No motion having been made after the filing of such intervention, to have the original petition considered as a petition in intervention in the so-called suit instituted by Illingsworth, and no motion having been made to withdraw the origial petition and refile the same after the filing of the Illingsworth intervention, and no effort of any kind having been made in the District Court by the relators to receive any benefit from, or assert any rights by the filing of such intervention, the relators can not now claim nor assert any such benefit or right.

If perchance this petition in intervention should be construed to be an original petition, and its filing the commencement of a new suit, and if perchance it should be held that it did not relate back to the time of the filing of the original petition, and was not affected by the vice of the premtaure filing of such original petition, then the proposition made for the first time on appeal that the original petition should in law be considered as an appropriate intervention in the Illingsworth suit is untenable. There is nowhere in the record any motion of any one asking the Court to consider such petition in intervention as an original petition, or to consider such original petition or any petitions in intervention as petitions in intervention in the so-called Illingsworth suit; neither is there any motion asking that they be withdrawn from the files with leave to refile them. The first time that the Court has been asked to have them considered either in

law or in fact as petitions in intervention in the so-called suit brought by Illingsworth is in the Circuit Court of Appeals. Of course it is fundamental that questions of practice to which the attention of the trial court should be directed by proper motion, can not be raised for the first time on appeal. If the parties themselves have not taken proper steps to save to themselves the right of action, if any, by the filing of the Illingsworth petition, then the second question propounded by the Court of Appeals should be answered in the negative.

5. If the filing of the Illingsworth intervention is to be regarded as the commencement of a new suit, then there was no service thereon upon this defendant nor appearance therein by it, prior to the dismissal thereof, and prior to the order of the court sustaining the plea and dismissing this defendant.

The suit was brought prematurely on January 3rd, 1910. The defendant, National Surety Company, appeared and filed its plea in abatement and answered subject to such plea, on May 3rd, 1910. Illingsworth filed his petition in intervention subsequent to such answer, on May 25th, 1910. It was voluntarily dismissed on February 2nd, 1911 (Certificate p. 4). There is nothing in the record indicating any service upon the National Surety Company upon such petition in intervention. There is nothing in the certificate to indicate that there was any service upon or appearance by the National Surety Company pending the period this intervention was before the court. However, the record shows that on January 9th, 1911 (Record 183) the National Surety Company filed its amended plea in abatement and first amended original answer (Record 163). This was the first appearance it made in the case after Illingsworth's plea in intervention was filed, and was more than one year after final settlement, which

is admitted to have been on November 11th, 1909. Its amended plea and answer makes no reference to the Illingsworth petition except as it answers it as a petition in intervention, it being entitled to be considered as such, subject to the plea in abatement. The portion of the answer relating to Illingsworth begins as follows (Record 172): "Answering the petition of intervention of the intervenor W. Illingsworth, this defendant says: That the material alleged to have been sold," etc. If the Illingsworth intervention is to be considered as a new suit as of the date filed, then there was never any service thereon, neither was there any appearance entered thereto by the National Surety Company and the "suit," if it be such, was voluntarily dismissed by Illingsworth, without service or an appearance thereto, on February 2d, 1911, before the plea was sustained on February 22d, 1911 (Certificate p. 4). It is, of course, fundamental that if it related back to the filing of the original petition, and was simply a petition in intervention, then no further service was necessary. It is equally as patent that it amounted to the commencement of a new suit, such service was necessary.

6. If the filing of the Illingsworth intervention is to be regarded as the commencement of a new suit, then there was no statutory service in person or by publication upon creditors of notice of the new suit thus commenced. Moreover, when such petition in intervention was dismissed on February 2d, 1911, the year within which service must be had, had elapsed and there was no way in which the statute could be complied with, by giving such notice, which notice is vital to the right of the relators to maintain the suit.

The certificate discloses that, after the filing of the original petition, on January 3d, 1910, and before this

defendant had on May 3d, 1910 filed its answer, "an appropriate order for service by publication and notice was had." It makes no reference to such publication and service of such notice, neither is there anything in the certificate, or in the record to indicate that, after the Illingsworth petition in intervention was filed, on May 25th, 1910, there was any order for service by publication and notice, or that any service by publication and notice was had. In fact no such order was asked for and none had, and the record which is sent up by the Circuit Court of Appeals, as originally filed in that Court, fails to show any such order or notice. It is submitted that the provision of the law for giving notice to creditors is not directory only, but mandatory, and is a condition precedent to the materialmen's right to recover on the bond; and that the last publication must be completed three months before the expiration of the year from final settlement, or the creditor's right is barred. This was so held in the case of U. S. ex rel vs. Stannard, 206 Fed. 326. The Statute contains the following provisions:

> "Provided further, that in all suits instituted under the provisions of this Act, such personal notice of the pendency of such suit, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto **notice by publication in some newspaper of general circulation, published in the city or town where the contract is to be performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor.**"

The provision and purpose of this Statute is plain—it requires that the notice by publication shall be completed three months before the year expires in which there exists the statutory right of intervention. Its purpose is

that creditors shall have this full three months notice of the suit, and be given this time to act, before their rights are destroyed by the lapse of time. The burden of seeing that such publication is made is placed upon the party, or parties, who institute the suit as permitted by statute, they having no right to profit by their own inactivity in these regards. If this burden is not imposed upon the party or parties bringing the suit, then there is nothing to prevent them from doing all in their power to prevent notice of the pendency of said suit being brought to the attention of other creditors. Thus, in the event the total obligation of the bond is insufficient to satisfy all creditors, they, by withholding notice, may create a situation so that other creditors will not intervene, and they who bring the suit will receive a larger portion of the fund to be distributed. The proceeding is in the nature of one in equity, impounding a fund for distribution, and the first essential act is to obtain jurisdiction of the fund. This can be done only by giving the requisite statutory service to creditors who have the right to intervene. It is submitted that this service is jurisdictional; and that, without it, the court has no right to proceed. If this proposition is correct, then, after the petition in intervention of Illingsworth was filed on May 25th, 1910, there should have been an appropriate order for statutory service upon creditors, and the record should show that such service was had and completed three months prior to November 11th, 1910, this latter date being one year after final settlement under the contract. No such service was had, and the only service was that which had been obtained under the order made upon the filing of the original petition.

If the failure to obtain this service within the year after the final settlement was had does not defeat jurisdiction, then it is submitted that the failure to complete service thereon before the petition in intervention itself

was dismissed on February 2d, 1911, defeats and destroys the right to obtain service thereon at any subsequent time. If the mere filing of the intervention operated as tending to save a right of action to the parties filing the original bill, then the failure to perfect service upon the other creditors destroyed this inchoate right. In other words, in answering the second question propounded by the Circuit Court of Appeals, in order to determine whether the right of action was saved to the parties so filing the original petition by the intervention of Illingsworth, it is necessary, not only to look to the petition itself and what preceded its filing, but it is necessary to look to that which followed such filing, and to ascertain whether the statutory steps were taken in reference thereto, so as to save a right of action to any creditor and particularly to the creditors who had filed the original petition.

Whatever conclusion of law may be reached by this court in reference to the effect of the filing of the petition in intervention of Illingsworth, it is respectfully submitted that the failure of any of the creditors to take any action whatever upon the filing of such bill, either by asking to have it considered as an original bill commencing a new suit, or asking that their petitions be considered as petitions in intervention, or by asking for an order for service thereon to other creditors, or by serving this defendant with new process, shows conclusively that none of the parties to said suit, unless it be Illingsworth himself, sought in the District Court to assert any rights by reason of the filing of such petition. Failure to procure an appropriate order for service upon such bill was another evidence that the attention of the District Court was not called to the character of the Illingsworth petition in intervention; and that no effort at all was made by the parties themselves to have their right of action

saved by the filing of the same. It is therefore submitted that, if the parties themselves, while they were before the District Court, did not seek to have their cause of action saved by such filing of such petition in intervention, the question propounded to this Court by the Circuit Court of Appeals should be answered in the negative.

7. The printed certificate before this Court, page 4, shows that at the January term of such court, to-wit: on February 22d, 1911, the plea of the National Surety Company was heard and the cause was dismissed as to the National Surety Company with its costs, and that "to the action of the Court in dismissing the case as to the National Surety Company the plaintiffs duly and seasonably excepted." Such printed certificate further shows that at the May term of said Court, to-wit, on May 26th, 1911, the cause was dismissed as to the defendant, McCord, upon the grounds that the suit was instituted prior to the expiration of six months from the completion of the work and the final settlement with the Government; and that therefore the action was not maintainable upon the bond sued upon. It further shows that "to the action of the Court in dismissing the cause as to the defendant, McCord, the plaintiffs duly and seasonably excepted upon the grounds," among others, set forth in paragraph No. 3 of page 4, of the printed certificate, such paragraph referring to the intervention of Illingworth. This latter exception was allowed upon the action of the Court in dismissing the cause as to McCord and the defendant, National Surety Co., was not concerned therein, because it was at a time when it was not in Court, it having been dismissed at a previous term. There is therefore no exception touching the effect of the Illingsworth petition in intervention which authorizes the Circuit Court of Appeals to consider the effect of filing

such petition, and there is therefore no exception which authorizes this Court to consider such second question, and the failure to reserve such exception requires this Court, in the event it considers such question, to answer the same in the negative, because, if the parties thus asserted any right by reason of filing such intervention, they should have directed the attention of the trial Court to such right by the reservation of an exception, and, in the absence of such reservation, no right or action was saved to them.

The Act of March 11th, 1902, c 183, Section 12, 32 Statutes, 69, provides that the terms of the Circuit Court for the Northern District of Texas shall be held at Dallas, (where this cause was filed), on the second Monday of January, and the first Monday of May of each year. The National Surety Company was dismissed from this cause on February 22nd, 1911, which, of course, was during the January term. This was the time that the plaintiffs duly and seasonably excepted to such action. The bill of exceptions is not copied into the certificate by the Circuit Court of Appeals, but is found on pages 210, 211 and 212 of the printed transcript as originally filed in the Circuit Court of Appeals, and is in the nature of a general exception, no specific grounds in support thereof being pointed out in such bill. The case of Michigan Insurance vs. Anson Eldred, 143 U. S. 293, is authority for the proposition that the bill of exceptions allowed at the May term upon the dismissal of the petition as to McCord ought not to be considered when determining the rights of the National Surety Company which was dismissed at the January term. If the bill of exceptions reserved at the January term upon

the action of the Court in dismissing and abating this suit suit as to the National Surety Company is sufficient to entitle the Appellate Court to consider the effect of the filing of the Illingworth intervention, then it is respectfully submitted that the silence of the record as to any effort to assert rights by reason of such intervention until the May term, shows conclusively that the Trial Court was not asked to exercise any discretion with a view of protecting any possible rights which may have accrued to the original relators by reason of the filing of such petition and intervention.

IV.

It is true that in Texas, cases brought upon claims not matured and before contractual precedents have been complied with, an amendment after such maturity or compliance cures the premature filing, and simply mulcts the plaintiffs for then accrued costs.

The Supreme Court of Texas, however, has never gone so far as to hold that where there is a statutory provision requiring certain things to be done, or certain time to elapse, before the institution of a suit, that the premature filing of such suit could be cured by a subsequent amendment setting forth the fact that such time had elapsed or such conditions had been complied with prior to the filing of the amendment. A similar question has been before the Court of Civil Appeals of the State for the Fourth District in two cases. The first is that of Burrows vs. Gonzales County, 23 S. W. 829, being a suit against the county, and there being a statute which required that the account sued upon must be presented to the Commissioners' Court be-

fore suit has been filed. In considering the case, the Court said:

> "The plaintiff's right to sue had not vested when he filed the original petition, as there had been no presentation of his claim to the commissioners. Realizing that difficulty, he afterwards presented the claim, and upon its rejection filed his amended original petition, in which he supplies the necessary allegation; and one of the exceptions involved the ruling of the Court upon the question whether or not such fact not having existed when the suit was filed, it could be introduced by an amendment. It is unnecessary to discuss the question of whether the amended original peition constituted an amendment to the pleading or a new suit, for defendant voluntarily appeared in reference to it. If it were regarded as the bringing of a new suit, all that defendant could have required was to be cited, and an appearance waived this. This ground, as an exception to petition was not substantial."

In the case cited, however, there was a judgment in the trial Court sustaining this and other demurrers and the cause was dismissed. The Appellate Court disagreed with the trial Court in reference to this particular demurrer. Its judgment was nevertheless affirmed, and the question was never passed upon by the Supreme Court.

The same Court of Civil Appeals in the case of City of El Paso vs. Ft. Dearbon, 71 S. W. 799, again applied the rule which it had announced in the case just cited. In the El Paso case a plea in abatement urged that the original petition failed to allege that the plaintiffs had applied to the City Council in writing for redress and had been refused, in conformity with a provision of the charter which reads that no suit of any nature whatever shall be main-

tained against the city unless the plaintiff shall aver and prove such fact. The original action was brought without such demand, and subsequently the plaintiffs filed their amended original petition alleging therein that prior to its filing they had demanded of the city possession and restitution of the premises and damages and that the application was refused. In considering the plea of abatement the Court said:

> "The amended petition containing the essential allegations constituted a new suit, if as appellant contends the previous pleading and proceedings were nullities. It may be that defendant was entitled to citation upon the amended petition, but defendant appeared and pleaded thereto. It may be, also, that any adverse possession by defendant of the property was not interrupted until the amended petition was filed. The question presented by these assignments we have had occasion to consider before, and we overrule them."

The judgment of the trial Court in the last cited case was affirmed by the Court of Civil Appeals, but the Supreme Court granted a writ of error and reviewed the case, reversing and rendering judgment for the defndant (74 S. W. 21) upon the statute of limitations. In the course of its opinion it says:

> "A number of other questions were raised in the Court of Civil Appeals and were considered there, but we find it unnecessary to decide any of them except those affected by the defense of limitation under the five years' statute."

It will thus be seen that it is an open question in Texas whether when there is a statute fixing a time or a condition precedent to the filing of a suit, its premature filing can be cured by an amendment. As is known to this Honorable

Court, the opinions of Courts of Civil Appeals in Texas are not binding upon any other Court of Civil Appeals, and are never regarded as as unquestioned precedent by the Supreme Court. This Court, therefore, has no authoritative precedent from the courts of Texas which it may consider itself bound to follow. In such absence this Court, it is submitted, should follow the case of American Bonding Co. vs. Gibson County, 145 Fed. 871, 76 C. C. A. 155, cited and quoted from above.

VI.

Be that as it may, the Court of Civil Appeals, in the case cited, recognizes the necessity of citation upon or appearance to such an amendment or a consequent nullity of any judgment rendered. If the practice in Texas governs, and if these opinions of the Court of Civil Appeals are adopted by this Court as the law of the State, then such service was necessary.

VII.

The action declared upon being created by an act of Congress, and the limitations and conditions being imposed by such act, the effect of the premature filing of a suit thereon and without the authority granted by the act, is not to be determined by the laws of the State in which the action is brought, but by the act itself construed in reference to the common law as applied by the Federal Courts.

If the foregoing proposition is correct, the judgment of the Court below should be affirmed upon the authority of the American Bonding Co. vs. Gibson County, 145 Fed. 871, 76 C. C. A. 155, cited in a preceding paragraph of this brief.

While there is no case directly in point, there are many cases in which it is held that where a cause of action is originated and regulated by an act of Congress, the laws of the State in which the cause of action arose or in which the suit was brought do not control in the matter of practice. The case of Arnson vs. Murphy, 109 U. S. 238, 27 L. E. 920, was one brought to recover back money illegally exacted by the collector of customs. The Court held that the common law right to such recovery had been converted to one of statutory liability by the laws of Congress, and that the remedy conferred by Congress was exclusive to all others, and that no action arose to the claimant in such case until after the decision against him by the Secretary of the Treasurer, as required by such act. In considering this case the Court said:

> "It is apparent that the common law action has been converted into an action based entirely upon a different principle—that of statutory liability, instead of an implied promise—which, if not originated by the act of Congress, yet is regulated, as to all its incidents by express statutory provisions. And among them are the conditions which fix the time when suit may begin, and prescribe the period at the end of which the right to sue shall cease. Congress having undertaken to regulate the whole subject, its legislation is necessarily exclusive."

In a subsequent appeal of this came case, 115 U. S. 579, 29 L. E. 493, the Court said:

> "The conditions imposed by the statute can not, any of them, be regarded as matter, a failure to comply with which; must be pleaded by the defendant as a statute of limitation. The right of action does not exist independently of the statute, but is conferred by it."

VIII.

If the case of American Bonding Co. vs. Gibson County, id., is accepted as a controlling authority in this Court, then it is unnecessary to further discuss the effect of the filing of the amendment by the Texas Portland Cement Company on January 10th, 1911. Under this decision it did not cure the fatal defect of the premature commencement of the suit. If it is to be regarded as a petition in intervention in the so-called Illingsworth suit, then such petition constitutes the first appearance of the original relators, their original petition being a nullity on account of its prematurity. If it was such an intervention, then it was filed more than one year after the final settlement, the filing being on January 9, 1911, and the final settlement having been made Nov. 11, 1909. This was at a time when under the authority of Baker Contract Co. vs. U. S., 204 Federal 396, its right of action by intervention or otherwise was destroyed. It is submitted that the statute, and the rules of law to which effect is given in the cases cited govern, rather than the rules of limitation and pleading which may prevail in the State wheren suit is instituted. This is not a case which calls for the application of any rule relative to the statute of limitations. It is governed solely by the Act of Congress, and there is no statutory right of action unless begun within the period of time fixed by the act, itself. However, inasmuch as the plaintiffs in error contend, that under the Texas practice, the filing of this amendment saved their original suit, this defendant in error submits that their contention is based upon an erroneous conception of Texas law. They say in their brief (pp. 28 and 29):

> "If A sues B upon a promissory note prior to its maturity and the action is not dismissed, but pends, and thereafter A amends his petition setting up the mtaurity of the note, although such amended peti-

tion be not filed until after four years from the maturity of the note, saves the action."

No authority cited by the plaintiffs in error support this proposition and a diligent search results in finding none. On the contrary, an analysis of the decisions cited by the plaintiffs in error, and a close reading of the opinions therein, when applied to the facts, indicates that the Supreme Court is of the opinion that such is not the law. This view is also in harmony with other opinions herein cited.

The case of Foote vs. O'Roork, 56 Tex. 215, cited by plaintiffs in error, simply supports the proposition that a suit brought on a promissory note before the bar of limitation was completed, such note being payable to an administrator, and the plaintiffs averring that they are the owners by virtue of being heirs of the estate in question, such filing inures to the benefit of another heir who intervenes in such suit claiming an interest in the note as an heir.

The case of Kinney vs. Lee, 10 Tex. 155, also thus cited, was one in which the original petition failed to allege that the acceptor of a conditional bill had received the money out of which the bill, as drawn, was to be paid. An amendment was thereafter made showing the receipt of such money. The opinion does not show whether the amendment charged that the money had been received before the filing of the suit or subsequently. The syllabus, however, officially edited, is as follows:

"While suit was brought on the conditional promise, but there was no averment of the happening of the conditions, but afterwards, and after four years an amendment was filed which averred that the **conditions had happened before the commencement of the suit.**" Held: limitation was interrupted by the filing

of the petition.

In the case of Howard vs. Windom, 86 Tex. 560, cited by plaintiffs in error, there was a supplemental petition filed within four years setting up a new promise. Four years after such promise, an amended petition was filed carrying into it the matter set up in the supplemental petition. The Court held that the supplemental petition, as it is termed, contained all the substantial averments of a petition upon a new promise, with an appropriate prayer for relief, and although it was bad because it did not comply with the rules as to form, its filing did operate to stop the statute of limitations.

The rule is amplified and explained in the case of Cotulla vs. Urbahn, 126 S. W. 1108, where the Supreme Court in refusing a writ of error wrote an opinion. This was a case where a supplemental petition had been filed setting up a new promise within the four-year period. The trial Court sustained exceptions to this supplemental petition, and plaintiff thereupon set up the new promise in an amended petition after the four years' statute had run against such new promise. The Supreme Court said:

> "The true cause of action was upon the new promise, and not upon the original note, according to a long line of decisions, and from this it follows that the purpose of further pleading on the part of plaintiff was to cure a defect in his petition, so as to make it show a good cause of action, which required an amendment of that petition, and not a supplemnetal petition. We therefore do not agree with the Court of Civil Appeals in the opinion that the course first taken by plaintiff was correct. The trial judge, however, took the same view that we do, sustaining exceptions to the supplemental petition, and plaintiff thereupon set up the new promise in an amended petition. We

agree with both courts in holding that the fault in pleading was a mere irregularity, which did not prevent the declaring upon the new promise from having the effect of stopping limitation from the time of the filing of the supplemental petition."

In this connection attention is again invited to the expression of the Court of Civil Appeals in the case of City of El Paso vs. Dearborn, 71 S. W. 799, where a suit was instituted before a statutory prerequisite had been complied with, and in which opinion the Court said:

"It may be, also, that any adverse possession of the defendant to the property was not interrupted until the amended petition was filed."

This latter opinion would never have contained this expression had the law been as contended herein by the plaintiffs in error. It is a judicial expression that in this class of cases the law does not permit a premature filing to be cured by an amendment after the action is barred.

IX.

Recapitulating, it is submitted that the suit was prematurely brought; that the plea in abatement was timely interposed; that, after the Illingworth petition was filed in May, no service of any kind or character was had, or sought to be had thereon, either directed to this defendant, or to any interested creditors, that none of the parties named in the original petition took any action in the cause between the filing of the original petition on January 3d, 1910, until on January 10th, 1911, when an amended petition was filed elaborating the allegations of the original petition (certificate page 3); that no effort by motion or otherwise was, during this time, made to take any advantage of the filing of the Illingworth intervention; that the opinion of the District Judge makes no reference to the

Illingworth petition; that no exception was reserved, based upon the filing of the Illingworth petition, until a subsequent term of court. The record therefore clearly discloses the fact that there was no desire nor purpose nor intention upon the part of the original relators, or any intervenors, to assert or to acquire, when this cause was pending in the trial Court, any rights whatever by reason of the filing of the petition in intervention of Illingworth. The relators, it appears from the record, when they were in the trial Court, were willing to stand or fall, so far as this defendant was concerned, upon the proposition that their suit was not prematurely brought and that at the time it was brought they had authority to prosecute the same in the name of the United States.

X

Wherefore, the defendant in error, National Surety Company, respectfully submits that, in so far as it is concerned, the Circuit Court of Appeals should have dismissed this writ of error, and that this Court should decline to answer the certified questions, and should direct a dismissal, that, if any other ruling is made thereon, and the questions are considered by this Honorable Court, they should each be answered in the negative, and it so prays.

Respectfully submitted,

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